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IN THE

SUPREME COURT OF THE UNITED STATES

Term 1975

NO. 74-6257

TROY LEON GREGG

Petitioner

-v-

STATE OF GEORGIA

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

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ATTORNEY FOR PETITIONER

IN THE

SUPREME COURT OF THE UNITED STATES

TROY LEON GREGG)

Petitioner)

Vs.)

THE STATE OF GEORGIA)

Respondent)

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Georgia entered on October 17, 1974, rehearing denied, October 29, 1974.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Georgia is reported at 233 Ga. 117 (1974) and is set out in Appendix A hereto, pp. 1a - 14a, infra.

JURISDICTION

The judgment of the Supreme Court of the State of Georgia was entered on October 17, 1974, and is set out in Appendix A hereto. An order extending the time for filing this petition for writ of certiorari to and including March 28, 1975 was signed by Mr. Justice Powell, Associate Justice of this Court, on February 5, 1975. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether probable cause for a subsequent warrantless arrest may be satisfied through information received from an informant who had not seen the commission of the crimes for which the arrest was made or any previous criminal or incriminating conduct on the part of the person arrested, and who had never been an informant in the past?

2. Whether a waiver of rights executed after the administration of the Miranda warnings and at the time of arrest applies to custodial interrogation sessions held a matter of hours after arrest, where the person executing the waiver was neither interrogated at the time he was warned nor interrogated in the subsequent sessions by the same officers who had administered the Miranda warnings to him?

3. Whether the totality of the circumstances under which a confession made by petitioner was obtained rendered the confession involuntary in violation of the Due Process of Law guaranteed by the Constitution of the United States?

4. Whether the imposition and carrying out of the sentence of death for the crime of murder under the law of Georgia violates the Eighth or Fourteenth Amendment to the Constitution of the United States?

5. Whether the provisions for appellate review of death sentences established by the new Georgia capital punishment statute, Georgia Laws 1973, pp. 159-172, Act No. 74, violate the rights of an indigent defendant to the effective assistance of counsel guaranteed by the Sixth Amendment to the Constitution of the United States and to the Due Process o. Law and Equal Protection of the Laws guaranteed by the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the Code of Georgia:

Ga. Code Ann. §26-1101

"Murder (a)...[A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.

"(b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.

"(c) A person convicted of murder shall be punished by death or by imprisonment for life."

Ga. Code Ann. §26-1902

"Armed Robbery A person commits armed robbery when with intent to commit theft, he takes property of another from the person or the immediate presence of another by use of an offensive weapon. The offense robbery by intimidation shall be a lesser included offense in the offense of armed robbery. A person convicted of armed robbery shall be punished by death or imprisonment for life, or by imprisonment for not less than one nor more than 20 years."

Ga. Code Ann. §26-3102

" Capital offenses; jury verdict and sentence. Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstances and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstance shall be necessary in offenses of treason or aircraft hijacking. The provisions of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty."

Ga. Code Ann. §27-2302 (1973)

" Recommendation to mercy. In all capital cases, other than those of homicide, when the verdict is guilty, with a recommendation to mercy, it shall be legal and shall mean imprisonment for life."

Ga. Code Ann. §27-2514

" Sentence of death; copy for penitentiary-superintendent. Time and mode of conveying prisoner to penitentiary. Expenses. Upon a verdict or judgment of death made by a

"jury or a judge, it shall be the duty of the presiding judge to sentence such convicted person to death and to make such sentence in writing, which shall be filed with the papers in the case against such convicted person, and a certified copy thereof shall be sent by the clerk of the court in which said sentence is pronounced to the superintendent of the State penitentiary, not less than 10 days prior to the time fixed in the sentence of the court for the execution of the same; and in all cases it shall be the duty of the sheriff of the county in which such convicted person is so sentenced, together with one deputy or more, if in his judgment it is necessary, and provided that in all cases the number of guards shall be approved by the trial judge, or if he is not available, by the ordinary of said county in which such prisoner is sentenced, to convey such convicted person to said penitentiary, not more than 20 days nor less than two days prior to the time fixed in the judgment for the execution of such condemned person, unless otherwise directed by the Governor, or unless a stay of execution has been caused by appeal, granting of a new trial, or other order of a court of competent jurisdiction, and the expense for transporting of said person to the penitentiary for the purpose of electrocution shall be paid by the ordinary of the county wherein the conviction was had, or the board of county commissioners, the county commissioner, or other person or persons having charge of the county funds, out of any funds on hand in the treasury of such county."

Ga. Code Ann. §27-2534.1

" Mitigating and aggravating circumstances; death penalty.- (a) The death penalty may be imposed for the "the offenses of aircraft hijacking or treason, in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or Kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney

"or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the [statutory] aggravating circumstances enumerated in Code section 27-2534.1(b) is so found, the death penalty shall not be imposed."

"Ga. Code Ann. §27-2537

" Review of death sentences.- (a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court, within ten days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Georgia together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed, and the report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of Georgia.

(b) The Supreme Court of Georgia shall consider the punishment as well as any errors enumerated by way of appeal.

(c) With regard to the sentence, the court shall determine:

(1) Whether the sentence of death was imposed under the the influence of passion, prejudice, or any other arbitrary factor, and

(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Code section 27-2534.1(b), and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

"(d) Both the defendant and the State shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for re-sentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of Georgia in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

(f) There shall be an Assistant to the Supreme Court, who shall be an attorney appointed by the Chief Justice of Georgia and who shall serve at the pleasure of the court. The Court shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. The Assistant shall provide the court with whatever extracted information it desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant.

(g) The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence.

(h) The office of the Assistant shall be attached to the office

"of the Clerk of the Supreme Court of Georgia for administrative purposes.

(i) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence."

Georgia Laws, 1973, p. 162, Act No. 74

"At the conclusion of all felony cases heard by a jury, and after argument of counsel and proper charge from the court, the jury shall retire to consider a verdict of guilty or not guilty without any consideration of punishment. In non-jury felony cases, the judge shall likewise first consider a finding of guilty or not guilty without any consideration of punishment. Where the jury or judge returns a verdict or finding of guilty, the court shall resume the trial and conduct a pre-sentence hearing before the jury or judge at which time the only issue shall be the determination of punishment to be imposed. In such hearing, subject to the laws of evidence, the jury or judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any such prior criminal convictions and pleas; provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The jury or judge shall also hear argument by the defendant or his counsel and the prosecuting attorney, as provided by law, regarding the punishment to be imposed.

"The prosecuting attorney shall open and the defendant shall conclude the argument to the jury or judge. Upon the conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions and the jury shall retire to determine the punishment to be imposed. In cases in which the death penalty may be imposed by a jury or judge sitting without a jury, the additional procedure provided in Code section 27-2534.1 shall be followed. The jury, or the judge in cases tried by a judge, shall fix a sentence within the limits prescribed by law. The judge shall impose the sentence fixed by the jury or judge, as provided by law. If the jury cannot, within a reasonable time, agree to the punishment, the judge shall impose sentence within the limits of the law; provided, however, that the judge shall in no instance impose the death penalty when, in cases tried by a jury, the jury cannot agree upon the punishment. If the trial court is reversed on appeal because of error only in the pre-sentence hearing, the new trial which may be ordered shall apply only to the issue of punishment."

Georgia Laws, 1973, p. 171, Act No. 74

"Any person who has been indicted for an offense punishable by death may enter a plea of guilty at any time after his indictment, and the judge of the superior court having jurisdiction may, in his discretion, during term time or vacation, sentence such person to life imprisonment, or to any punishment authorized by law for the offense named in the indictment. Provided, however, that the judge of the superior court must find one of the statutory aggravating circumstances provided in Code section 27-2534.1 before imposing the death penalty except in cases of treason or aircraft hijacking."

STATEMENT

This is a petition for a writ of certiorari to review the judgment of the Supreme Court of Georgia, entered on October 17, 1974, affirming petitioner's two death sentences for the offenses of murder while setting aside and remanding for resentencing petitioner's two death sentences for the offenses of armed robbery. Petitioner, TROY LEON GREGG, was sentenced to die on February 7, 1974, in the Gwinnett County Superior Court of Georgia, upon convictions for the murder and armed robberies of Fred Edward Simmons and Bob Durwood Moore.

On November 21, 1973, petitioner and a traveling companion by the name of Floyd Ralford ("Sam") Allen were hitchhiking north on the Florida Turnpike when they were picked up by Fred Edward Simmons and Bob Durwood ("Tex") Moore. Subsequently, the automobile in which the four men were traveling broke down. Simmons, the owner of the automobile, then summoned a Florida Highway Patrolman to drive Moore and himself to a local used car dealer, where Simmons purchased a 1960 red and white Pontiac. Simmons and Moore then reunited with petitioner and Allen and resumed their journey northward.

At the intersection of I-10 and I-75 in Florida, another hitchhiker, Dennis Weaver, was picked up. Weaver rode in the automobile until approximately 11:00 P.M., the night of November 21, where he was let out of the car at the intersection of I-85 and North Druid Hills Road in Atlanta. Petitioner drove while Weaver was in the car as both Moore and Simmons were both drinking heavily. Weaver testified at trial that no fighting words were exchanged by any of the men while he was present. T. 126.

The four men continued traveling in a northerly direction on I-85 to its intersection with Georgia Highway 20 in Gwinnett County, where the car was stopped so as to allow Simmons and Moore the opportunity to relieve themselves. The bodies of Simmons and Moore were found near this intersection the following morning. Each victim's death was determined to have been caused by gunshot wounds, a medical examiner for the State testifying that Simmons had been shot in the right corner of the right eye in the region of the temple (T.97) and Moore had been shot once in the right cheek of the face and once in the rear of his head. T. 92.

After reading about the alleged murders in an Atlanta paper on November 23, Weaver contacted the Gwinnett County Police Department, told them about his travels with the victims, gave descriptions of petitioner and Allen and the make and color of the automobile, and indicated that he thought the projected destination was Asheville, North Carolina. Based on this information, Gwinnett County Police broadcast a wanted description for the car and suspects over the National Crime Information Center teletype. That message led to the subsequent arrest of petitioner and Allen in Asheville on November 24. At the time of arrest, petitioner was driving a 1960 red and white Pontiac, which car was subsequently determined to be the one that Simmons had previously purchased.

Petitioner was placed under arrest on the ground that he was "wanted for investigation in Gwinnett County, possibly on a murder case." T. 165. No criminal charges were filed against petitioner at this time. A "shake down" search was then conducted, and a weapon later identified as the murder weapon was recovered, along with approximately $107.00 in cash, from the person of petitioner. A subsequent search of the car produced a bill of sale of the car to Simmons and some old clothes, and a search of the motel room where petitioner was staying turned up a stereo tape outfit and a car stereo player.

When the car was stopped at 3:00 P.M., petitioner was given the Miranda warning, and he thereafter signed a written waiver of his rights at 3:17 P.M. T.516. Petitioner was held at the police headquarters in Asheville from this time to approximately 9:30 P.M., at which time he was turned over to the Gwinnett County Police. From the time petitioner was placed under arrest to the time the Gwinnett Police arrived in Asheville, no interrogation of petitioner took place. T. 180. At the prompting of Gwinnett County authorities, petitioner made a statement at approximately 11:00 P.M. that was reduced to writing and signed by him. The statement was exculpatory in nature; although petitioner admitted shooting Simmons and Moore, he claimed to have done the shooting in self-defense. T. 282.

In this statement, petitioner further admitted taking four to five hundred dollars from the bodies after the shooting. T. 283. The Miranda warnings were not repeated to petitioner before he made this statement; in fact, they were never given to petitioner after being initially administered to him upon his arrest.

After making his statement, petitioner then returned to the lobby of the police station where he allegedly made the incriminating statement, "By God, I wanted them dead" in response to a question from Asheville Detective William Gibson as to "why he shot those people." T. 379. This statement was introduced at trial in rebuttal to petitioner's trial testimony that he had not meant to kill Moore and Simmons.

At approximately 1:00 A.M. the morning of November 25, petitioner was released to the custody of the Gwinnett County Police and was transported by automobile back to Lawrenceville, Georgia. Petitioner was handcuffed during the return trip, which lasted about four hours. T. 284. In the automobile with petitioner during the return trip were the District Attorney of Gwinnett County, who was in the back seat with petitioner, Detective Blannott and Lt. Morris, both of the Gwinnett County Police Department. T. 284. Following this car was the 1960 Pontiac, in which Sam Allen, along with Police Chief Crunkleton and Sergeant Mills of the Gwinnett County Police Department, James Burton of the District Attorney's Office of Gwinnett County, and Major Lawler of the Asheville Police Department rode. T. 285.

On returning to Georgia, the two cars went to the intersection of Georgia 20 and I-85 and stopped. The time was approximately 5:00 A.M., and the cars were stopped at the scene of the crime for the express purpose of reconstructing events. T. 290. Everyone got out, and Allen, (who was subsequently allowed to enter a plea, received a life sentence and did not testify against petitioner at trial) in the presence of petitioner and in response to a question from Detective Blannott, accused petitioner of shooting the victims without provocation and for the sole purpose of robbing them. Detective Blannott testified as to this statement at trial. T. 287. At the prompting of Chief Crunkleton, petitioner allegedly made a confession of the crimes at the scene (T. 287,288), although petitioner subsequently refused to sign a writing that set forth this alleged confession. T. 288.

Petitioner was tried simultaneously for the murders and armed robberies of Moore and Simmons. Petitioner testified under oath in his own defense, the testimony being similar to his earlier signed statement. T. 320, 321. At the conclusion of the evidence, the trial court charged the jury that it could find him either guilty or not guilty of the two charges of murder, and of the two charges of armed robbery. The jury found petitioner guilty of all four charges.

A sentencing hearing was then held, at which neither the State nor petitioner introduced any evidence. The trial court charged the jury that it could decide to recommend a death sentence for murder if it found:

> "One - That the offense of murder was committed while the offender was engaged in the commission of two other capitol felonies, to wit, the armed robbery of Fred Edward Simmons and Bob Durwood Moore.
>
> Two - That the offender committed the offense of murder for the purpose of receiving money and the automobile described in the indictment.
>
> Three - The offense of murder was outrageously and wantonly vile, horrible and inhuman, in that they involved the depravity of the mind of the defendant." T. 478, 479.

The jury was further instructed that it could decide to recommend a death sentence for armed robbery if it found:

> "That the offense of armed robbery was committed while the offender was engaged in the commission of two capitol felonies, to wit, the murders of Fred Edward Simmons and Bob Durwood Moore or that the offender committed the offense of armed robbery for the purpose of receiving money and the automobile set forth in the indictment, or three, that the offense of armed robbery was outrageously and wantonly

"vile, horrible and inhuman in that they involved the depravity of the mind of the defendant." T. 479

The jury recommended death on each of the four counts. The "aggravating circumstances" found by the jury to justify its death verdict for the two counts of murder were:

> "One - offense of murder was committed while the offender was engaged in the commission of two other capitol felonies, to wit: the armed robbery of Fred Edward Simmons and Bob Durwood Moore. Two, the offender committed the offense of murder for the purpose of receiving money and the automobile described in....[the two indictments]." T. 483,484.

The "aggravating circumstances" found by the jury to justify its death verdict for the two counts of armed robbery were:

> "One - the offense of armed robbery was committed while the offender was engaged in the commission of two capitol felonies, to wit; the murders of Fred Edward Simmons and Bob Durwood Moore. Two - the offender committed the offense of armed robbery for the purpose of receiving money and the automobile set forth in...[the two indictments]" T. 484,485.

The trial court thereupon sentenced petitioner to die.

On October 17, 1974, the Georgia Supreme Court affirmed petitioner's convictions and the two death sentences for the offenses of murder while setting aside and remanding for resentencing petitioner's two death sentences for the offenses of armed robbery. One Justice concurred specially, while one Justice dissented on the ground that the Georgia capitol punishment statute was unconstitutional. The Court denied rehearing on October 29, 1974, with one Justice dissenting.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. A timely motion to suppress evidence arising out of or subsequent to the arrest of petitioner was overruled by the trial court. In the Supreme Court of Georgia, petitioner's Enumeration of Error No. 5 asserted as error the act of the trial court, "In overruling the Motion to Suppress any and all evidence arising out of or subsequent to the arrest of the Defendant." This issue was briefed and rejected by a majority of the Supreme Court of Georgia. Gregg vs State, 233 Ga., at 123 (1974) (App. A, infra, at 7a). Petitioner again raised this issue in his petition for rehearing, but this petition was denied.

2,3. Timely objections were made to allowing the witness Blannott to testify as to conversations with and the statement of the petitioner and in allowing the statements and alleged confession of petitioner to be admitted into evidence, which objections were overruled by the trial court after a Jackson vs Denno hearing. In the Supreme Court of Georgia, petitioner's Enumeration of Error No. 6 asserted as error the act of the trial court, "In overruling the objections to and allowing the witness Blannott to testify as to conversations with and the statement of the Defendant." Further, Enumeration of Error No. 7 asserted as error the act of the trial court, "In allowing the statements of and the alleged confession of the Defendant to be admitted into evidence, over objection." These issues were briefed and rejected by a majority of the Supreme Court of Georgia. As to petitioner's contentions that his earlier waiver of rights after being given the Miranda warnings did not apply to his subsequent statements, the Court below held: ". . . we cannot agree with his claim that the Miranda warnings had gone stale." Gregg vs State, 233 Ga., at 125 (1974) (App. A, infra, at 9a). The Court below further held:

> "Moreover, considering the totality of the circumstances, the record supports the determinations by the judge and the jury in the Jackson vs Denno hearing that the statements were voluntarily made." Id.

Petitioner again raised these issues in his petition for rehearing, but this

petition was denied.

4,5. In the Supreme Court of Georgia, petitioner's Enumeration of Error No. 3 asserted that:

> "The lower Court erred in submitting to the jury the issue of punishment by death in that punishment by death constitutes cruel and inhumane punishment contrary to the provisions of the Eighth and Fourteenth Amendments to the Constitution of the United States."

This issue was briefed and rejected by a majority of the Supreme Court of Georgia on the ground that the Court had previously upheld the constitutionality of the Georgia death statute, citing, inter alia, Colley vs State, 231 Ga. 829 (1) (1974). Gregg vs State, 233 Ga., at 125, 126 (1974) (App. A, infra, at 9a, 10a). Petitioner again raised this issue in his petition for rehearing, but this petition was denied.

REASONS FOR GRANTING THE WRIT

1. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER PROBABLE CAUSE FOR A SUBSEQUENT WARRANTLESS ARREST MAY BE SATISFIED THROUGH INFORMATION RECEIVED FROM AN INFORMANT WHO HAD NOT SEEN THE COMMISSION OF THE CRIMES FOR WHICH THE ARREST WAS MADE OR ANY PREVIOUS CRIMINAL OR INCRIMINATING CONDUCT ON THE PART OF THE PERSON ARRESTED, AND WHO HAD NEVER BEEN AN INFORMANT IN THE PAST.

The Fourth Amendment to the Constitution of the United States provides in material part:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause..."

Although the Fourth Amendment does not specifically require a finding of probable cause for warrantless searches and seizures, the requirements in these cases"... surely cannot be less stringent than where a...warrant is obtained." Wong Sun v. United States, 371 U.S. 471,479 (1963). Consequently, probable cause is also required for searches and seizures made without a warrant. Id.; Draper v. United States, 358 U.S. 307 (1959). The Fourth Amendment protection against unreasonable searches and seizures, the correlative requirement of probable cause, and the right to have excluded from criminal trials any evidence obtained in violation of the Amendment's guarantees are applicable to state prosecutions. Mapp v. Ohio, 367 U.S. 643 (1961).

An illegal arrest, or one made without probable cause, is an unreasonable seizure and is a violation of the Fourth Amendment. Terry v. Ohio, 392 U.S. 1 (1968). Probable cause for arrest requires facts and circumstances within the arresting officers' knowledge or of which he has reasonably trustworthy information which are sufficient to warrant a man of reasonable caution in believing that a crime had been committed and that the person to be arrested had committed it.

Carroll v. United States, 267 U.S. 132 (1925); Draper v. United States, 358 U.S. 307 (1959). Where, as here, probable cause to arrest is based upon information received from an informant, this "tip" must be accompanied by (1) "some of the underlying circumstances on which the informant based his conclusions", and (2) some basis to support the conclusion either that the informer was "credible" or his information "reliable". Aguilar v. Texas, 378 U.S. 108, 114 (1964). These two elements must both be established through testimony at the suppression hearing in cases where the arrest was made without a warrant. Beck v. Ohio, 379 U.S. 89 (1964).

Petitioner was arrested in Asheville, North Carolina upon a "wanted" bulletin issued by Gwinnett County Police and transmitted over the National Crime Information Center teletype. Since the Asheville police had no more probable cause to arrest than did the authority transmitting the bulletin, Whitely v. Warden, 401 U.S. 560 (1971), the information upon which the wanted bulletin was based must be examined to determine whether probable cause existed to arrest petitioner.

This bulletin was based upon information received from Dennis Weaver, a hitchhiker who had ridden in the car containing the victims and petitioner just prior to the occurrence of the alleged murders. After reading about the murders in an Atlanta newspaper on November 23, Weaver contacted the Gwinnett County Police Department and told Detective B. H. Blannott what he knew about the circumstances surrounding the deaths. He described in some detail the automobile in which he rod, knew the first names of the victims, indicated that the projected destination was Asheville, and gave physical descriptions of petitioner and his companion Sam Allen. T. 230. Weaver further made a drawing of petitioner in an attempt to more accurately describe his appearance. T. 231. This information comprised the bulletin that eventually led to petitioner's arrest. T. 239.

Since the determination of probable cause is based herein upon information as to which the person who must have probable cause (i.e., Detective Blannott) does not have direct knowledge, the two-pronged Aguilar requirement applies. See Note, "The Informer's Tip as Probable Cause for Search or Arrest," 54 Cornell L. Rev. 958 (1969). Was Weaver's tip accompanied by (1) underlying circumstances on which he based his conclusions, and (2) underlying circumstances indicating that he was credible or his information reliable? Weaver was not an eye-witness to the commission of the crimes, nor had he been a witness to any previous criminal or incriminating conduct on the part of petitioner. He was aware of no animosity on the part of petitioner toward the victims. Further, the Gwinnett County police had never relied upon information received from Weaver in the past in the conduct of investigations.

Although it is arguable that the tip was sufficiently detailed so as to indicate the underlying circumstances on which Weaver based his conclusions, yet the tip does not disclose why Weaver was believed to be a credible person. There is no indication that Weaver had provided information on past occasions which upon investigation proved to be correct, as in McCray v. Illinois, 386 U.S. 300 (1967) and Draper v. United States, 358 U.S. 307 (1959). The details of the tip related only to the description of petitioner and his companion and the automobile, matters purely collateral to the real issues of murder and armed robbery. The tip did not specify that petitioner was armed; in fact there is no indication that Weaver at any time saw the gun that was found on petitioner at the time of his arrest and that was subsequently identified as the murder weapon. Consequently, the detail of the tip provides no basis for inferring that the informant obtained his information in a reliable way. Thus, the tip itself is not sufficient to constitute probable cause because of the lack of the second element required under the Aguilar test.

Where the tip itself is deficient, other information may be considered in determining whether there is probable cause. "If the tip is found inadequate under Aguilar, the other allegations which corroborate the information contained in the hearsay report should then be considered..." Spinelli v. United States, 393 U.S. 410,415 (1969). However, this Court has stated:

> "Of course, the discoveries of an illegal search cannot be used to validate the probable cause judgment upon which the legality of the search depends." Whiteley v. Warden, 401 U.S. 560,564 (1971).

This indicates that corroboration of the deficient tip is limited to information and observations occurring prior to arrest: the "fruits" of the arrest cannot be used as an after-the-fact justification for an arrest that was not based upon probable cause at the time it was made. Since the tip went to details collateral to the crimes allegedly committed, as previously mentioned, any corroboration of the tip necessarily went to collateral details. Thus, the substance of tip, i.e. that petitioner committed the crimes for which he was arrested, was not rendered more reliable by any corroboration that may have existed, and the tip consequently was not cured of its deficiency.

This Court's decision in United States v. Harris, 403 U.S. 573 (1971), does not call for a different result. In Harris, this Court held that evidence of an informant's prior credibility was not necessary in order to establish probable cause for the issuance of a search warrant. Although there was no corroboration of the informant's tip in Harris, the tip was found credible on the following grounds: (1) The report recounts the informer's alleged recent observations of criminal activity and contains a rather detailed description of the premises on which the criminal activity was occurring; (2) The investigator's affidavit asserts Harris' reputation as a bootlegger and the investigator's personal knowledge that liquor had been previously found in an abandoned house under "Harris' control"; and (3) The informer was, by supplying the information, admitting his own participation in a crime. Because this Court gave its decision in a three-part opinion, the division of the justices so that no part of the opinion had the support of a majority renders a determination of the precise holding of the Court fruitless. For this reason, Harris should be limited to its own specific fact situation. Obviously, the situation herein presented does not fall within the scope of Harris, for none of the three factors that lent credibility to the tip in Harris is present.

It is submitted for the above reasons that the information supplied by Weaver, together with any corroborating facts, was not sufficient to constitute probable cause to arrest petitioner. (Even though a warrant for petitioner's arrest was subsequently obtained by Gwinnett County authorities, the arrest was made without a warrant, because no warrant was in existence at the time of arrest. However, the Aguilar test is applicable to both arrests with and without warrants under Aguilar and Beck, supra, so this distinction is inconsequential.) Since probable cause was lacking, the arrest of petitioner was an unreasonable seizure under the Fourth Amendment, and it was error for the trial court to admit any evidence obtained in violation thereof. Mapp v. Ohio, supra. Under the "fruit of the poisonous tree" rule applicable to the evidentiary fruits of unconstitutional arrests, Wong Sun v. United States, 371 U.S. 471 (1963), the weapon and the cash seized from petitioner's person upon his arrest, the stereo tape outfit and the car stereo player seized from petitioner's hotel room, and the subsequent incriminating statements made by Sam Allen and petitioner himslef, were inadmissible under the exclusionary rule espoused in Mapp. The erroneous admission of the above evidence necessarily had a tremendous "...impact on the minds of the...jury", so as to affect the "substantial rights" of petitioner. Harrington v. California, 395 U.S. 250,154 (1969). For this reason the concept of "harmless error" cannot be invoked herein, and the erroneous admission into evidence of the above items constituted reversible error in violation of petitioner's rights guaranteed by the Fourth and Fourteenth Amendments to the Constitution of the United States.

II. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER A WAIVER OF RIGHTS EXECUTED AFTER THE ADMINISTRATION OF THE MIRANDA WARNINGS AND AT THE TIME OF ARREST APPLIES TO CUSTODIAL INTERROGATION SESSIONS HELD A MATTER OF HOURS AFTER ARREST, WHERE THE PERSON EXECUTING THE WAIVER WAS NEITHER INTERROGATED AT THE TIME HE WAS WARNED NOR INTERROGATED IN THE SUBSEQUENT SESSIONS BY THE SAME OFFICERS WHO HAD ADMINISTERED THE MIRANDA WARNINGS TO HIM.

The Fifth Amendment to the Constitution of the United States provides that no person "...shall be compelled in any criminal case to be a witness against himself...". In Miranda v. Arizona, 384 U.S. 436 (1966), in holding that the privelege against self-incrimination is applicable during a period of custodial interrogation, this Court supplemented the traditional due process requirement that a confession must be voluntarily made in order to be admissible in a criminal prosecution with specific rules aimed at safeguarding this privilege. After custodial interrogation "contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely," Id., at 467, this Court established guidelines relating to the right to remain silent and to counsel in police interrogations, whether state or federal.

These guidelines, which have come to be known as the "Miranda Warnings", require that the accused prior to any custodial interrogation be warned:

> "...that he has the right to remain silent, that anything he says can be used against him in a Court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he desires...". Id., at 478.

Although this Court recognized that these rights could be waived, it stated a strict policy in regard to waivers:

> "If the interrogation continues without the presence of an attorney, and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel..." Id., at 475 (emphasis added).

Petitioner was arrested at approximately 3:00 P.M on November 23, 1973. He was immediately given the Miranda Warnings by the arresting officer and he thereafter signed a written waiver of his rights at 3:17 P.M. Petitioner was not interrogated at that time nor at any time subsequent thereto by the arresting officer. T. 180. Instead, he was held at the police headquarters in Asheville pending the arrival of Gwinnett County authorities, who arrived in Asheville at approximately 9:30 P.M. Petitioner was then turned over to the Gwinnett authorities, and upon their prompting made a statement that was reduced to writing and signed by him at approximately 11:30 P.M. T. 283. In this statement, petitioner alleged that he shot the victims in self-defense, and further admitted taking four to five hundred dollars from the bodies after the shooting. T. 282,283. The Miranda Warnings were not repeated to petitioner before he made this statement; in fact the warnings were never given to petitioner after they were initially administered to him upon his arrest. T. 297.

After making his statement, petitioner then returned to the lobby of the Asheville police station where he allegedly made the incriminating statement, "By God, I wanted them dead", in response to a question from Asheville Detective William Gibson as to "why he shot those people." T. 379. At approximately 5:00 A.M. on November 24, a full fourteen hours after petitioner was arrested and given his Miranda Warnings, petitioner is alleged to have confessed to the commission of the crimes. T. 288.

Each of the above three statements of petitioner was the product of "custodial interrogation", because each statement resulted from "...questioning initiated by law enforcement officers after...[petitioner was]...taken into custody or otherwise deprived of his freedom of action in any significant way." Id., at 444.

It is immaterial whether these statements met the technical requirements of a confession:

> "No distinction can be drawn between statements which are direct confessions and statements which amount to 'admissions' of part or all of an offense. This privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination." Id., at 476.

The issue herein presented thus resolves itself into the question of whether the written waiver of rights executed after the administration of the Miranda Warnings and at the time of petitioner's arrest applies to petitioner's later statements so as to satisfy the "heavy burden" placed upon the State to demonstrate a knowing and intelligent waiver by petitioner of his privilege against self-incrimination?

In Miranda, this Court made the following statements:

(1) "...a warning at the time of the interrogation is indispensible to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time." Id., at 469 (emphasis added).

(2) "Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked." Id., at 474.

(3) "Opportunity to exercise these rights must be afforded to him throughout the interrogation." Id., at 479.

The above statements indicate this Court's strong concern that the accused be given a continuing right to invoke the privilege against self-incrimination while subject to custodial interrogation, and that the accused be apprised of this right prior to his being subjected to the coercive pressures engendered by custodial interrogation.

Petitioner was given the Miranda Warnings by the arresting officer, and immediately thereafter executed a waiver of rights. Yet he was not subjected to interrogation for a period in excess of eight hours after his arrest. Further, when he was initially subjected to interrogation, the interrogators were not the arresting officers, but were Gwinnett County authorities. Finally, petitioner's alleged confession was made a full fourteen hours after his arrest, and was made under the most coercive of circumstances (i.e., at the scene of the crime, at 5:00 A.M., in the presence of a horde of law enforcement officials, and in response to an accomplice's accusation that petitioner was the sole perpetrator of the crimes). If the purpose of the warning is to "...show the individual that his interrogators are prepared to recognize is privilege should he choose to exercise it", Id., at 468, then clearly under the circumstances herein presented, the earlier written waiver cannot be held to satisfy the "heavy burden" placed upon the State to demonstrate a knowing and intelligent waiver by petitioner prior to his being subjected to interrogation. Because of the substantial time interval between the execution of the waiver and the commencement of interrogation, together with the circumstances surrounding the subsequent interrogation sessions, a contrary holding would thwart and render nugatory the salutory purpose behind the privilege against self-incrimination, as espoused by this Court. In terms of the Fifth Amendment then, petitioner's three statements must be considered to have been involuntarily made.

This Court in Miranda further stated:

> "But unless and until such warnings and waivers are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him." Id., at 479.

Thus, it was error for the trial court to admit into evidence the three incriminating statements made by petitioner, since it was not shown that petitioner effectively waived his Miranda rights. In Chapman v. California, 386 U.S. 18,23 (1967), this Court stated that the right to keep an involuntary confession out of evidence may be "so basic to a fair trial" that its violation could never be harmless error.

Chapman arguably stands for the principle that the admission of an involuntary confession requires automatic reversal; however, in light of the gravity and number of the involuntary incriminatory statements that were admitted into evidence, harmless error cannot be invoked herein under any reading of Chapman. For this reason, the erroneous admission into evidence of the three involuntary statements made by petitioner constituted reversible error and a violation of petitioner's constitutional privilege against self-incrimination.

III. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE TOTALITY OF THE CIRCUMSTANCES UNDER WHICH A CONFESSION MADE BY PETITIONER WAS OBTAINED RENDERED THE CONFESSION INVOLUNTARY IN VIOLATION OF THE DUE PROCESS OF LAW GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES.

In order for a confession to be admissible in a criminal prosecution, it is a requirement of due process of law that the confession be voluntarily made. This requirement of voluntariness is binding on the states under the Due Process Clause of the Fourteenth Amendment. Brown v. Mississippi, 297 U.S. 278 (1936). The requirement of voluntariness being based on the due process clause, is separate and independent from the specific rules governing the admissibility of confessions enunciated in Miranda, supra, which was based upon the Fifth Amendment privelege against self-incrimination. One of the goals sought to be achieved by the due process voluntariness requirement is to ensure the testimonial trustworthiness or reliability of a confession that is sought to be introduced into evidence. Brown v. Mississippi, supra. Mental, as well as physical, compulsion may render a confession unreliable and thus involuntary. Chambers v. Florida, U.S. 227 (1940). Another goal sought to be achieved by the voluntariness requirement is to deter offensive and improper police practices, even where reliability of the confession is not in issue. Rogers v. Richmond, 365 U.S. 534 (1961).

The voluntariness test requires an examination of the "totality of the circumstances" surrounding a confession. Haynes v. Washington, 373 U.S. 503 (1963). Petitioner is alleged to have confessed to the crimes of murder and armed robbery at the scene of the crime. Yet the circumstances surrounding the confession present the question of whether the confession was a product of petitioner's "rational intellect and...free will", Blackburn v. Alabama, 361 U.S. 199 (1960) or whether it was involuntary.

Petitioner was arrested in Asheville, North Carolina on November 23, 1973 at 3:00 P.M. for a crime allegedly committed in Gwinnett County, Georgia.

At 5:00 A.M. the morning of November 24, and after fourteen hours of detention during which no one other than the police had spoken to petitioner, the confession was allegedly made. The confession occurred after petitioner was taken upon returning to Georgia, to the scene of the crime for the express purpose of reconstructing events. T. 290. Those present at the scene of the crime included seven law enforcement officials and petitioner's accomplice, Sam Allen. T. 284, 285. Petitioner was handcuffed at the time. Allen, in the presence of petitioner and in response to a question from Detective Blannott, attempted to exculpate himself by accusing petitioner of shooting and robbing the victims. T. 287. Detective Blannott testified at trial that, upon being asked by Chief Crunkleton if Sam's account was correct, petitioner replied, "Yes, it was." T. 287. To Crunkleton's subsequent question as to whether petitioner "...shot these men down in cold-blooded murder just to rob them", petitioner allegedly replied, "Yes." T. 288. Petitioner was not given the Miranda warnings at the scene of the crime; instead, reliance was placed upon a written waiver executed at the time of petitioner's arrest fourteen hours earlier. Petitioner denied making this confession, instead testifying that he answered the question by stating, "Same was doing the talking." T. 350. Petitioner subsequently refused to sign a writing that set forth the alleged confession. T. 288.

It is submitted that the "totality of the circumstances" set forth above renders the confession inherently unreliable and evidences a total disregard by the law enforcement authorities involved of proper police practices, thus thwarting both of the aforementioned goals sought to be served by the voluntariness test. Since either factor is sufficient to render the confession involuntary under the decisions of this Court, the concurrence of both factors a fortiori renders petitioner's confession involuntary and inadmissible at trial. For the reasons set forth in Part II of this petition, supra, the introduction of petitioner's confession into evidence cannot be considered to be harmless error. Therefore, the erroneous admission into evidence of the confession constituted reversible error and a violation of petitioner's rights to the Due Process of the Law guaranteed by the Constitution of the United States.

IV. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF MURDER UNDER THE LAW OF GEORGIA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

A. The Perpetuation of Arbitrary Selectivity Under the New Georgia Capital Punishment Statute[1]

On June 29, 1972, this Court invalidated the capital punishment laws of the State of Georgia and held that the death penalty could no longer be imposed under a statutory scheme which permitted its arbitrary, rare and discriminatory use. Furman v Georgia, 408, U. S. 238 (1972). In the wake of Furman,, the Georgia legislature modified its death penalty statutes, and it is under the modified statues that petitioner has been condemned to die. The question presented here is whether the modifications wrought by the Georgia legislature are substantial enough to meet the minimum requirement of Furman v. Georgia - - that the most extreme penalty known to contemporary man not be imposed arbitrarily.

Once this Court has determined the existence of unconstitutional practices, it has heretofore invalidated subsequent contrivances and evasions which seek to perpetuate such practices in new guises. Cf. Guinn v United States, 238 U. S. 347, (1915) with Lane v Wilson, 307 U. S. 268 (1939). The Constitution "nullifies sophisticated as well as simple-minded modes of discrimination." Lane v Wilson, supra, at 275. As will be demonstrated infra, death sentences are still "wantonly and . . . freakishly imposed," Furman v. Georgia, supra, at 310 (Mr. Justice Stewart, concurring) in Georgia, and the statutory modifications of 1973 provide "no meaningful basis for distinquishing the few cases in which . . . [the death

[1]Part IV-A, Introduction herein is adapted from Part I-A of the Petition for Certiorari, Eberheart vs Georgia, No. 74-5174 (filed August 19, 1974.)

penalty] is imposed from the many cases in which it is not." Id., at 313 (Mr. Justice White, concurring.)

The new Georgia law provided a bifurcated trial for the administration of the death penalty for inter alia, murder and armed robbery. See generally Coley v. State, 231, Ga. 829 (1974). After the jury or judge returns a verdict or finding of guilty or after a plea of guilty to one of these crimes, a sentencing hearing is conducted before the jury or judge, and at this hearing, "the jury or judge shall hear additional evidence in extenuation, mitigation and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of such prior convictions and pleas." Ga. Laws 1973, p. 162, Act No. 74.[2] The State may present only such evidence in aggravation as it has made known to the Defendant.

The judge is to consider or to include in his instructions to the jury "any mitigating circumstances or aggravating circumstances otherwise authorized by law and . . . statutory aggravating circumstances which may be supported by the evidence." Ga. Code Ann. §27-2534.1 (b). The "statutory aggravating circumstances" for which the death penalty may be imposed in murder and armed robbery cases are:

> " (1) The offense of murder . . . [or] armed robbery . . . was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who had a substantial history of serious assaultive criminal convictions.
>
> (2) The offense of murder . . . [or[armed robbery . . . was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.
>
> "(3) The offender by his act of murder [or] armed robbery . . . knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.
>
> (4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.
>
> (5) The murder of a judicial officer, former judicial officer, district attorney, or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.
>
> (6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.
>
> (7) The offense of murder . . . [or armed robbery] . . . was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.
>
> (8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.
>
> (9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.
>
> (10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another."

Ibid. What, if any, additional "aggravating circumstances" are "otherwise authorized by law" is obscure. "Mitigating circumstances " are not defined or enumerated at all.

[2] This section was modified in certain minor respects by Ga. Laws, 1974, p. 355 - 358, Act No. 854, which also provided that the section would be designated Ga. Code Ann. §27-2503.

The jury may - but need not - impose a death sentence in all capital cases dher than those of homicide when it finds beyond a reasonable doubt a "statutory aggravating circumstances." For to condemn a defendant, it must also make a "recommendation of death." [3]Ga. Code Ann. §27-2534.1 (c). See Ga. Code Ann. §26-3102.

Provision is made for the filing of a standardized form of "report" by the trial judge in capital cases where the death penalty is imposed and for direct automatic appeal to the Georgia Supreme Court. General guidelines for review are provided, [4]and the Georgia Supreme Court is empowered to affirm the death sentence or to set it aside and remand the case for resentencing. Ibid.

[3]At the time of petitioner's trial, Ga. Code Ann. § 27-2303 provided:

> "In all capital cases, other than those of homicide, when the verdict is guilty, with a recommendation to mercy, it shall be legal and shall mean imprisonment for life."

[4]The Court is directed to consider "the punishment as well as any errors enumerated by way of appeal" in a case where a death sentence has been imposed and to determine:

> "(1) Whether the sentence of death was imposed under the influence of passon, prejudice, or any other arbitrary factor, and
>
> (2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Code section 27-2534.1 (b), and
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

Ga. Code Ann. §27-2537 (c). If the court affirms a death sentence, it "shall include in its decision a reference to those similar cases which it took into consideration." Ga. Code Ann. §27-2537 (e).

Executive discretion to grant or deny clemency in cases where a death sentence has been imposed remains unregulated.

The discrepancy between the regularity and even-handedness constitutionally required in capital sentencing and the unpredictable arbitrariness which results from the modified Georgia procedures can only be appreciated after analysis of the various selective mechanics which operate before, during, and after sentencing of defendants charged with crimes potentially punishable by death. For the imposition of a death sentence in Georgia remains an extraordinarily rare and fortuitous event not only because judges and juries so often seize the opportunity for mercy offered in sentencing discretion, but also because a death sentence signifies that a defendant has missed each of the many opportunities for a lesser disposition.

In order to avoid burdening this Court with repetitive matter, petitioner herein adopts and incorporates the argument stated in Part I-A (1) - (3) of the Petition for Certiorari, Eberheart vs Georgia, No. 74-5174 (filed August 19, 1974) at pp. 25-46(attached hereto as Appendix B). For the reasons stated in Part I-D of the Petition for Certiorari, Dillard v North Carolina, No. 73-6875 (filed June 11, 1974) at pp. 45-51 (attached hereto as Appendix C), petitioner urges this Court to consider whether the penalty of death violates "the evolving standards of decency that mark the progress of a maturing society." Trop v Dulles, 356 U. S. 86, 100 (1958) (plurality opinion of Chief Justice Warren).

V. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE PROVISIONS FOR APPELLATE REVIEW OF DEATH SENTENCES ESTABLISHED BY THE NEW GEORGIA CAPITAL PUNISHMENT STATUTE, GEORGIA LAWS 1973, PP. 159-172, ACT NO. 74, VIOLATE THE RIGHTS OF AN INDIGENT DEFENDANT TO THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND TO THE DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES?

To avoid burdening this Court with repetitive matter, petitioner adopts and incorporates the argument set forth in Part II of the Petition for Certiorari, Eberheart v. Georgia, No. 74-5174 (filed August 19, 1974) at pp. 49-58 (attached hereto as Appendix D).

CONCLUSION

Petitioner prays that the petition for a writ of certiorari be granted.

Respectfully submitted

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APPENDIX A

Opinion of the Court below.

28996. GREGG v. THE STATE.

1. There was ample evidence to support the verdict finding the appellant guilty of the multiple offenses of murder and armed robbery.

2. Since voluntary manslaughter was not involved here, it was not error to fail to charge thereon.

3. The trial court did not err in overruling the motion for directed verdicts as to the armed robberies.

4. There was probable cause for the arrest of the appellant and his subsequent statements were voluntary.

5. Imposition of the death penalty pursuant to Code Ann. § 27-2534.1 (Ga. L. 1973, p. 159) does not constitute cruel and unusual punishment in violation of the Constitution of the United States.

6. There was no error in the imposition of two death sentences for the offenses of murder upon the appellant in this case since all the statutory standards were met; however, the two death penalties for the armed robbery offenses cannot be sustained under the statutory standards.

ARGUED JULY 9, 1974 — DECIDED OCTOBER 17, 1974 — REHEARING DENIED OCTOBER 29, 1974

Murder. Gwinnett Superior Court. Before Judge Merritt.

Harrison & Garner, G. Hughel Harrison, for appellant.

Bryant Huff, District Attorney, Arthur K. Bolton, Attorney General, John B. Ballard, Jr., Deputy Assistant Attorney General, for appellee.

GRICE, Chief Justice.

Troy Leon Gregg was tried and convicted in the Superior Court of Gwinnett County for the murders and armed robberies of Fred Edward Simmons and Bob Durwood ("Tex") Moore. The case is before this court on appeal and mandatory review of the death sentences imposed on each of the four counts charging these crimes.

In substance, the issues involve (1) overruling the

motion for new trial; (2) failing to charge on voluntary manslaughter; (3) overruling a motion for acquittal; (4) allowance of evidence arising from arrest, conversations and statements of the appellant; (5) invalidity of the statute providing for capital punishment; and (6) illegal imposition of such punishment.

1. The first enumeration of error contends that the trial court erred in overruling the appellant's amended motion for new trial. The allegations of that motion are incorporated in the other enumerations of error except for the one based upon the general grounds. Although not argued by the appellant and thus normally deemed to be abandoned, we have nevertheless reviewed the transcript of evidence upon those grounds because of the capital punishment imposed.

The evidence which the state presented to prove guilt is that which follows.

On Wednesday morning, November 21, 1973, the appellant Gregg (age 25) and a traveling companion Floyd Ralford ("Sam") Allen (age 16) were hitchhiking north in Florida. They had only $8 between them when they were given a ride by the above named victims. About two hundred forty miles north of Miami on the Florida Turnpike, their automobile broke down. A Florida State Highway Patrolman accompanied Simmons and Moore to an automobile dealer where Simmons purchased a 1960 red and white Pontiac. Thereafter, they again picked up Gregg and Allen and resumed their journey northward. Enroute, both Simmons and Moore were seen in possession of large sums of money.

At the intersection of I-10 and I-75 in north Florida, another hitchhiker, Dennis Weaver, was picked up. He rode with the group until he got out at the intersection of I-85 and Highway 23 (North Druid Hills Road) in Atlanta, Georgia, at approximately 11:00 p.m. that evening. Gregg drove during the time Weaver was in the car while Simmons and Moore did considerable drinking. No fighting words were exchanged by any of the men while he was present.

Allen stated to a police detective in the appellant's presence as follows: that at the intersection of Georgia Highway 20 and I-85 in Gwinnett County, Georgia, they

stopped for a rest stop and Simmons and Moore got out; that Gregg turned around and told Allen to get out, "we're going to rob them"; that Gregg lay up on the car with a gun in his hand to get good aim and as Simmons and Moore were coming back up the bank he fired three shots; that one of the men fell and the other staggered; that Gregg then circled around the back of the car and approached the two men, both of whom were then lying in a drainage ditch; that Gregg placed the gun to one's head and pulled the trigger, then went quickly to the other one and placed the gun at his head and pulled the trigger again; that he took their money and whatever contents were in their pockets; and that he then told Allen to get in the car and they drove away.

The bodies of Simmons and Moore were found in the drainage ditch. A State Crime Laboratory medical examiner stated that death was caused by gunshot wounds, that Simmons had been shot in the right corner of the right eye in the region of the temple and Moore had been shot once in the right cheek of the face and once in the rear of his head.

On Friday morning, November 23, 1973, the hitchhiker, Dennis Weaver, went to an Atlanta restaurant for breakfast. While there he noticed an article on the front page of an Atlanta newspaper that led him to call the Gwinnett County Police Department. He told them he thought Gregg and Allen were going to Asheville, North Carolina. In response to a bulletin from Gwinnett County authorities, the Asheville Police apprehended Gregg driving Simmons' 1960 Pontiac at about 3:00 p.m. November 24, 1973. With him in the car were Allen and three other persons. A .25-caliber automatic pistol was found in Gregg's pocket. He also had approximately $107 in cash. Ballistics tests subsequently established that bullets from the gun in Gregg's pocket caused the death of Simmons and Moore.

Weaver accompanied police officers to Asheville where he identified the automobile in which he had ridden with Gregg and the two victims, and headbands worn by Gregg and Allen.

At the scene of the crimes, when confronted with a narration of the crimes by Allen, Gregg made no protest.

When asked if that was how it happened, he responded, "Yes, it was."

In rebuttal of defense evidence the state established that when asked by an Asheville detective why he did it, Gregg replied: "By God, I wanted them dead." Also, the state presented evidence that the appellant, while awaiting trial, wrote a letter to Allen, requesting that he testify as outlined in the letter, which accorded with the appellant's trial testimony.

The appellant testified that he and Allen were given a ride by Simmons and Moore; that throughout the trip Simmons and Moore were drinking beer or whiskey; that when they stopped at the intersection of Georgia 20 and I-85 "Fred hit me on the left jaw and knocked me in the drainage ditch and I got back up and asked him to leave me alone and he hit me the second time and knocked me back into the drainage ditch and when I come out of the drainage ditch the second time he came at me. I don't know what he had in his hand, it could have been a knife or pipe, I don't know what it was, but when he came at me the second time I shot him."

The appellant swore that he was very scared; that he left there because he was scared and drove the car up I-85 until they got to Howard Johnson's and stayed all night; that he did not mean to kill either one of the victims and shot them to protect himself; that he had over a hundred dollars on him by virtue of a cab driver he bumped into repaying money owed him; and that the new clothing and equipment in his possession when he was apprehended were either bought by Allen, found in the motel room, or already owned by him. He denied writing some of the words in the letter of instruction written to Allen while both were in jail.

We conclude that the verdict was not contrary to the evidence, that there was ample evidence to support it and that it was not contrary to law or the principles of justice and equity.

2. The second enumeration alleges that the trial court erred in failing to charge on voluntary manslaughter (Code Ann. § 26-1102; Ga. L. 1968, pp. 1249, 1276).

In *Williams v. State*, 232 Ga. 203, 204 (206 SE2d 37),

this court held that there must be at least some evidence to support a charge of voluntary manslaughter before it is required; and that "The evidentiary circumstances necessary to show voluntary manslaughter, as opposed to circumstances showing the homicide was justified, relate to a situation which arouses sudden passion in the person killing so that, rather than defending himself, he wilfully kills the attacker, albeit without malice aforethought, when it was not necessary for him to do so in order to protect himself. The distinguishing characteristic between voluntary manslaughter and justifiable homicide in such cases is whether the accused was so influenced and excited that he reacted passionately or whether the defendant acted simply to defend himself."

Here, however, the state's evidence showed only murder and armed robbery. Also, the thrust of the appellant's testimony was that of self-defense. He disclaimed any intent to kill, stating that he shot Simmons because Simmons had pushed him into a ditch and was threatening him with a knife or pipe, and that he shot Moore because Moore was beating Allen.

In our view, the evidence failed to show any "sudden, violent and irresistible passion resulting from serious provocation" (Code Ann. § 26-1102, supra). Therefore, voluntary manslaughter was not in issue and the trial court did not err in refusing to instruct the jury as to that principle of law.

3. The fourth enumeration insists that the trial court erred in overruling the motion for directed verdict of acquittal of the appellant as to Counts 2 and 4 of the indictment (armed robbery of Simmons of the automobile and armed robbery of Moore of $400 in money), in that the evidence was insufficient to sustain the verdict and sentence.

We do not agree.

(a) Evidence of ownership and possession of the Pontiac automobile by Simmons was as follows.

The Florida Highway Trooper referred to above testified that when he stopped to investigate a 1960 Ford which broke down on the Florida Turnpike, Simmons told him it was his; that Simmons asked the trooper to drive

him to buy another car; that he purchased a 1960 red and white Pontiac at Johnson's Auto Sales in Winter Garden, Florida; that he saw Simmons receive a bill of sale which Simmons and the seller, Ralph Johnson, signed and he witnessed; that he saw Simmons leave in the 1960 Pontiac with the bill of sale; that Simmons paid $275 for the car; and that actual title was to be picked up on the return trip. This was the same automobile with the bill of sale in it which the appellant was driving at the time of his arrest in Asheville.

This court has previously held that "In an indictment for robbery, ownership of the property taken may be laid in the person having actual lawful possession of it . . ." *Spurlin v. State*, 222 Ga. 179 (7) (149 SE2d 315).

In our view, the evidence here indicates both possession and ownership in Simmons as alleged in the indictment as the victim of the robbery.

(b) The transcript reveals that money was obtained by the appellant from Moore as alleged in Count 4 of the indictment.

In this connection, the Florida highway trooper testified that Simmons and Moore had a considerable amount of money; that after paying for the Pontiac they still had a "wad" left over; that it looked like a considerable amount of money, consisting of cash, tens and twenties, and bills of various denominations; that the tall man (Moore) had most of the money in several pockets; and that he kept pulling money out of all different pockets.

Also, Detective Blannott stated that the appellant told him that "we took four or five hundred dollars off them and left in their car"; that in the presence of Allen and the investigating officers, the appellant admitted that Allen's recitation of the facts was correct wherein he stated that appellant took the money from the victims' pockets after he had shot them and they were lying in the ditch; that the appellant had in his possession on arrest $107 in cash; and that he was wearing new boots and there was some new clothing in the car.

It was also shown that the officers later found additional new clothing, a stereo tape outfit and a new stereo tape player for a car in the motel where the

appellant was staying.

We hold that the evidence was sufficient to justify the jury in finding that money was taken from Moore by the appellant, as alleged in Count 4 of the indictment.

For these reasons, Enumeration 4 cannot be sustained.

4. Enumerations 5, 6 and 7 allege error (a) in overruling the motions to suppress evidence arising out of or subsequent to the arrest of the appellant; and (b) in overruling the objections to and allowing the witness Blannott to testify as to conversations with and the statement of the appellant and in allowing the statements and alleged confession of the appellant to be admitted into evidence.

As we view the evidence, there was probable cause for the appellant's arrest; and his subsequent statements were voluntarily made with full awareness of his rights.

First, a review of the evidence available to the Gwinnett County police is pertinent to a determination of whether there was probable cause for their bulletin through the National Crime Information Center which culminated in the appellant's arrest in Asheville.

This evidence showed that the bodies of Moore and Simmons were found, apparently dead of gunshot wounds. Weaver described Simmons' red and white Pontiac in great detail as well as the two other hitchhikers, Allen and the appellant, who were with Moore and Simmons when Weaver got out of the car in Atlanta, a short time before the murders occurred north of Atlanta. The Gwinnett County authorities knew that Allen and the appellant, and the automobile, had already left the scene of the crime with the possibility of extended flight.

Clearly, from this evidence there was probable cause for a reasonably prudent person to believe that a crime had been committed by the appellant. United States v. Harris, 403 U. S. 573, 584 (91 SC 2075, 29 LE2d 723) (1971); *Hood v. State*, 229 Ga. 435 (192 SE2d 154).

The Asheville authorities were, in effect, an extended arm of the Gwinnett County authorities in this situation. Therefore, if probable cause existed with the Gwinnett County police, they were justified in publishing

the bulletin, and the Asheville police were proper in making the arrest pursuant thereto. *Johnson v. State*, 230 Ga. 196 (1a) (196 SE2d 385).

Incident to the lawful arrest, search of the car stolen from the victims was likewise justified. *Johnson v. State*, 230 Ga. 196 (1b), supra. Moreover, under the circumstances here, the possibility of loss of the automobile and its contents as evidence also authorized the search. Chambers v. Maroney, 399 U. S. 42 (90 SC 1975, 26 LE2d 419); *Mitchell v. State*, 226 Ga. 450 (2) (175 SE2d 545); *Hood v. State*, 229 Ga. 435 (1), supra.

In addition, under prior holdings of this court, the appellant, having no property interest in the stolen automobile, lacked standing to complain of the search. *Dutton v. State*, 228 Ga. 850 (1) (188 SE2d 794) and citations

We, therefore, determine that the arrest and the subsequent search of the appellant and the automobile in his possession were lawful.

Second, in regard to the admissibility of the appellant's statements, his alleged confession and the testimony of Detective Blannott as to his conversations with appellant, the following evidence was manifest.

Immediately after the appellant's arrest (at approximately 3:15 p.m.) he was given a warning that complied fully with the requirements of Miranda v. Arizona and he signed a waiver of rights form reciting the Miranda warning. Officer Gibson of the Asheville Police Department was present. At about 11:30 p.m. the appellant was questioned by Detective Blannott of the Gwinnett County Police Department who determined that the appellant had been advised of his rights and that he understood them.

Appellant then made a statement to Detective Blannott wherein he claimed to have shot in self-defense but admitted taking the automobile and the money. As appellant was about to leave for Georgia with the Gwinnett County authorities he asked Officer Gibson for a cigarette. Officer Gibson gave him a cigarette and asked appellant why he killed these people. Appellant's response was, "By God, I wanted them dead."

Then, as already pointed out, on their return to Georgia with the appellant in custody, the Gwinnett County officers stopped at the intersection of Georgia 20 and I-85 shortly before five o'clock in the morning, and in the presence of the appellant, Allen narrated how the appellant shot the two men in accomplishing the robbery and then shot them in the head. At that point the Chief of the Gwinnett County Police Department asked appellant if that was how it happened and appellant replied that it was. The Chief then asked, "You mean you shot these men down in cold blooded murder just to rob them?" and the appellant replied, "Yes."

Approximately fourteen hours expired between the time the appellant was apprehended, advised of his rights and executed a waiver until the last incriminating statement was made. However, we cannot agree with his claim that the Miranda warnings had gone stale. See in this connection, *Watson v. State*, 227 Ga. 698 (182 SE2d 446) (7 or 8 hour lapse); *Moten v. State*, 231 Ga. 642 (203 SE2d 527) (2 day lapse).

Moreover, considering the totality of the circumstances, the record supports the determination by the judge and the jury in the Jackson v. Denno hearing that the statements were voluntarily made. *Wilson v. State*, 229 Ga. 395 (191 SE2d 783). Indeed, the appellant does not even contend that he was confused as to his right to remain silent or to have an attorney present.

Therefore, we rule that the statements and confession of the appellant were properly admitted in evidence. Since both the appellant and Detective Blannott testified, there was no problem of confrontation as was involved in *Bennett v. State*, 231 Ga. 458 (202 SE2d 99), and the testimony of Detective Blannott was likewise not erroneously admitted.

5. The enumeration complaining that the trial court erred in submitting the issue of death to the jury because such punishment constitutes cruel and unusual punishment contrary to the Eighth and Fourteenth Amendments of the United States Constitution cannot be sustained.

The appellant's death sentences were imposed pursuant to Ga. L. 1973, p. 159 (Code Ann. § 27-2534.1) and the constitutionality of that statute was upheld in

Coley v. State, 231 Ga. 829 (1) (204 SE2d 612); *House v. State*, 232 Ga. 140 (3) (205 SE2d 217); and *Eberheart v. State*, 232 Ga. 247 (1) (206 SE2d 12).

The constitutionality of the application of the death penalty to the appellant is determined in the sentence review by this court pursuant to the above statute in Division 6, infra.

6. In his final enumeration of error the appellant avers that the trial court erred in imposing four death sentences upon him. Inasmuch as this enumeration is directed to sentence appropriateness, the contentions urged in its support will be resolved in sentence review.

The death penalty in this case must conform to the standards set forth in Code Ann. § 27-2534.1, supra, if it is to pass the test of constitutionality. Thus this court must determine whether the sentences of death have been imposed under the influence of passion, prejudice, or any other arbitrary factor; whether the evidence supports the jury's finding of a statutory aggravating circumstance; and whether the sentences of death are excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant, as required by Code Ann. § 27-2537 (c) (1, 3), supra.

We have reviewed the trial transcript and record, including the evidence, and we have made a comparison with the evidence and sentences in similar cases in accordance with the statutory mandate. Those similar cases considered by the court in reviewing the case are listed in an appendix attached to this opinion.

Using the standards prescribed for our review by the statute, our conclusion is that the sentences of death imposed here were not imposed under the influence of passion, prejudice or any other arbitrary factor.

In recommending the death penalty as to all four counts of the indictment, the jury found as follows: that the offenses of murder (Counts 1 and 3) were committed while the appellant was engaged in the commission of two other capital felonies, to wit, the armed robberies of Simmons and Moore (Code Ann. § 27-2534.1 (b, 2)) and for the purpose of receiving money and the automobile as described in the armed robbery indictments (Code Ann. § 27-2534.1 (b, 4)). The jury also found that the armed robberies were committed while the appellant was engaged in the commission of two capital felonies, to wit, the murders of Simmons and Moore (Code Ann. § 27-2534.1 (b, 2)), and for the purpose of receiving money and the automobile.

As we appraise it, the evidence supports the jury's findings of statutory aggravating circumstances as to the two counts of murder. After considering both the crimes and the defendant and after comparing the evidence and the sentences in this case with those of previous murder cases, we are also of the opinion that these two sentences of death are not excessive or disproportionate to the penalties imposed in similar cases which are hereto attached.

However, the death sentences imposed for the two armed robberies cannot be sustained.

Although there is no indication that these two sentences were imposed under the influence of passion, prejudice or any other arbitrary factor, the sentences imposed here are unusual in that they are rarely imposed for this offense. Thus, under the test provided by statute for comparison (Code Ann. § 27-2537 (b, 3)), they must be considered to be excessive or disproportionate to the penalties imposed in similar cases.

Furthermore, the two aggravating circumstances found by the jury in recommending death penalties for the two counts of armed robbery are not valid. Since the armed robberies were held to be aggravating circumstances authorizing the death penalties as to the murders, the murders cannot then be used in aggravation of the two armed robberies. The other aggravating circumstance enumerated by the jury in its verdict (commission of the armed robberies for the purpose of receiving money and the automobile) is not applicable to armed robbery since Code Ann. § 27-2534.1 (b, 4) refers only to the offense of murder, and thus it cannot be considered.

Therefore, as prescribed by the statute (Code Ann. § 27-2537 (c, 2)), the two sentences of death for the offenses of armed robbery must be set aside and the case remanded for resentencing by the trial judge on Counts

2 and 4 of the indictment, based upon the record and argument of counsel. The two death sentences for the offenses of murder (Counts 1 and 3 of the indictment) are affirmed.

See in this connection as to sentencing procedure, *Coley v. State*, 231 Ga. 829, supra; *House v. State*, 232 Ga. 140, supra; *Eberheart v. State*, 232 Ga. 247, supra.

Judgment affirmed in part; reversed in part. All the Justices concur, except Undercofler and Hall, JJ., who concur specially in Division 6, Ingram, J., who also concurs specially, and Gunter, J., who dissents.

APPENDIX

Similar cases considered by the court: *Henderson v. State*, 227 Ga. 68 (179 SE2d 76); *Hart v. State*, 227 Ga. 171 (179 SE2d 346); *Pass v. State*, 227 Ga. 730 (182 SE2d 779); *Watson v. State*, 229 Ga. 787 (194 SE2d 407); *Callahan v. State*, 229 Ga. 737 (194 SE2d 431); *Sirmans v. State*, 229 Ga. 743 (194 SE2d 476); *Scott v. State*, 230 Ga. 413 (197 SE2d 338); *Whitlock v. State*, 230 Ga. 700 (198 SE2d 865); *Kramer v. State*, 230 Ga. 855 (199 SE2d 805); *Bennett v. State*, 231 Ga. 458 (202 SE2d 99); *Howard v. State*, 231 Ga. 186 (200 SE2d 755); *Hunter v. State*, 231 Ga. 494 (202 SE2d 441); *Morgan v. State*, 231 Ga. 280 (201 SE2d 468); *House v. State*, 232 Ga. 140 (205 SE2d 217); *Allen v. State*, 231 Ga. 17 (200 SE2d 106); *Smith v. State*, 230 Ga. 876 (199 SE2d 793); *Johnson v. State*, 231 Ga. 138 (200 SE2d 734) *Lingerfelt v. State*, 231 Ga. 354 (201 SE2d 445).

INGRAM, Justice, concurring specially.

Division 6 of the court's opinion presents the question of whether the armed robberies, considered as aggravated circumstances to authorize the death sentence for the two murders, became included crimes in the murders. If so, the convictions for the two armed robberies must be reversed under Code Ann. § 26-506. "[A] crime is an included crime and multiple punishment therefor is barred if it is the same as a matter of fact or as a matter of law as specified in the Criminal Code." *State v. Estevez*, 232 Ga. 316, 319 (206 SE2d 475).

The factual and legal tests required by Code Ann. § 26-505 (a) and (b), respectively, for determining whether

the crimes are the same or not reveal that the armed robberies in this case are not included in the offenses of murder. They are separate crimes for which a conviction for each is authorized.

The consideration of the armed robberies as aggravating circumstances during the sentencing phase of the trial to authorize imposition of the death sentences for the murders does not make the armed robberies a part of the murder convictions. A prior conviction of some other armed robbery, if it existed, could have been considered as aggravating circumstances to authorize the death penalty and the mere fact that these armed robberies were contemporaneous with the murders would not prevent their use as aggravating circumstances in this case. Thus, I conclude there is no prohibition in either the statutory limitation on multiple prosecution for the same conduct or in the death penalty statute (Code Ann. § 27-2534.1) which would prevent the consideration of the armed robberies in this case as aggravating circumstances to authorize the death sentences for the two offenses of murder.

GUNTER, Justice, dissenting.

I dissent because it is my view that Georgia's death penalty statutes are unconstitutional. See the concurring part of my concurring and dissenting opinion in *Coley v. State*, 231 Ga. 829.

Also, 1974 enactments by the Georgia General Assembly on this subject are as follows: "In all capital cases, other than those of homicide, when the verdict is guilty, with a recommendation to mercy, it shall be legal and shall be a recommendation to the judge of imprisonment for life. Such recommendation shall be binding upon the judge." Ga. L. 1974, p. 353. And, "in all cases in which the death penalty may be imposed and which are tried by a jury, upon a return of a verdict of guilty by the jury, the court shall resume the trial and conduct a presentence hearing before the jury. Such hearing shall be conducted in the same manner as presentence hearings conducted before the judge as provided in subsection (a) of this section. Upon the conclusion of the evidence and arguments, the judge shall

give the jury appropriate instructions, and the jury shall retire to determine whether any mitigating or aggravating circumstances, as defined in Code Ann. § 27-2534.1, exist and whether to recommend mercy for the defendant. Upon the findings of the jury, the judge shall fix a sentence within the limits prescribed by law." Ga. L. 1974, p. 357.

I conclude that these 1974 enactments by the Georgia General Assembly expressly place discretion in the sentencing fact-finder to impose or not impose the death penalty in any case. And this is what I understand to be constitutionally impermissible under the decision of the Supreme Court of the United States in Furman v. Georgia, 408 U. S. 238 (92 SC 2726, 33 LE2d 346).

I respectfully dissent.

APPENDIX B

Pp. 25-46, Petition for Certiorari, Eberheart v. Georgia, No. 74-5174 (filed August 19, 1974).

1. Pre-Sentence Selective Mechanisms

Arbitrary selection operates well before sentencing to spare a substantial portion of Georgia capital defendants, although others similarly situated are ultimately sentenced to death. The principal importance of these pre-sentence selective mechanisms is that they provide an arbitrary sparing for all but a relative handful of defendants originally charged with capital crimes. But this screening out process is also significant because it effectively nullifies a key device upon which the new statute purportedly relies for the control of arbitrary discretion -- comparative review in the Georgia Supreme Court -- by limiting the base of the comparison to a fraction of the eligible population. See pp. 55-57, infra.

i. Prosecutorial Discretion

The impact of the district attorney's discretion on the administration of criminal justice in Georgia is enormous and is unaffected by the new capital punishment statute: "Whom he chooses to prosecute, what he charges them with, whether he charges them at all, whether he later drops the charges or recommends a lower sentence at the time of trial are all within the prosecutor's exercise of discretion."[12] In Georgia, the decision to prosecute and the choice of charges for which indictment will be sought are left to the district attorney's absolute, unguided discretion. The district attorney's mandate is simply

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12/ Note, Prosecutorial Discretion, 21 DE L. REV. 485, 486 (1971-1972).

"to prosecute all indictable offenses." Ga. Code Ann. §24-2908(4). In petitioner's case, for example, indictment might reasonably and responsibly have been sought for any one or any combination of the following crimes: rape (Ga. Code Ann. §26-2001), attempted rape (Ga. Code Ann. §§26-1001, 26-2001), aggravated sodomy (Ga. Code Ann. §26-2002), attempted aggravated sodomy (Ga. Code Ann. §§26-1001, 26-2002), kidnapping (Ga. Code Ann. §26-1311), attempted kidnapping (Ga. Code Ann. §§26-1001, 26-1311), false imprisonment (Ga. Code Ann. §26-1308), or attempted false imprisonment (Ga. Code Ann. §§26-1001, 26-1308), aggravated assault (assault with intent to commit rape, Ga. Code Ann. §26-1302), attempted aggravated assault (Ga. Code Ann. §§26-1001, 26-1302). The decision to prosecute petitioner for two capital crimes, (rape and kidnapping)[13], one of which nearly always involves the other, in a system where one feature that renders each crime potentially capital is its commission "while the offender was engaged in the commission of another capital felony," Ga. Code Ann. §27-2534.1(b)(2), is a striking example of the extent to which arbitrary prosecutorial decision-making may, quite literally, mean the difference between life and death.

13/ See note 26, infra.

The district attorney also has great discretion to enter a judgment of nolle prosequi. He must obtain the consent of the court,[14] but the standards for granting or denying such consent are nowhere specified. Ga. Code Ann. §27-1801.

Furthermore, the district attorney's discretion to plea bargain -- a process by which an estimated ninety per cent of all criminal cases are resolved[15] -- is utterly unfettered by the new capital punishment statute, or by any other significant restriction.[16] The fact that capital cases are likely to take up a great deal of time in preparation and trial makes them particularly likely to be settled by plea bargaining.[17] The peculiar harshness of a death sentence creates a relatively great risk that a conviction will be reversed on appeal for procedural error and increases the pressure to settle a capital case by a negotiated guilty plea:

14/ Once the case has been submitted to the jury, the district attorney must also obtain the consent of the defendant to enter a nolle prosequi. Ga. Code Ann. §27-1801.

15/ PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967).

16/ See Thomason v. Caldwell, 229 Ga. 637, 194 S.E.2d 112 (1972).

17/ Alschuler, The Prosecutor's Role in Plea Bargaining, 36 U.CHI. L. REV. 50, 55 (1966).

> "Since time immemorial [prosecutors] will prefer to get a definite conviction, without the tremendous expense that goes with a . . . [capital] trial, the taking of a chance that a jury may not convict, or that some technical error will be made in the heat of trial which will result in a reversal by an appellate court." 18/

See Caldwell v. Paige, 230 Ga. 456, 197 S.E.2d 692 (1973) (plea bargain made after death sentence reversed).

ii. Jury Discretion

Although the new Georgia capital punishment statute expressly confers sentencing discretion upon the trial jury following conviction, see pp. 32-36, infra, that is not the first or only means available to the jury to spare the defendant's life in cases where, if otherwise disposed, it might choose to sentence him to die. At the first stage of Georgia's bifurcated trial, the jury may convict him of a lesser offense, or it may recognize some amorphous and subjectively defined defense and acquit him altogether.

A Georgia trial judge must charge lesser included offenses when they are established under any view of the evidence, Sims v. State, 203 Ga. 668, 47 S.E.2d 862 (1948) and may give such a charge "where, from the evidence or from the defendant's statement at the trial, there is anything deducible which would tend to show that he was guilty of [the lesser offense] . . . or which would be sufficient to raise a doubt as to which of these grades [of the offense] . . . was committed." Echols v. State, 46 Ga.

18/ Bedau, Death Sentences in New Jersey, 19 RUTGERS L. REV. 1, 30 (1963).

668, 168 S.E. 790 (1933)(emphasis in original), citing Reeves v. State, 22 Ga. App. 628, 97 S.E. 115 (1918). Moreover, a charge regarding a lesser offense is essentially immune from appellate scrutiny even though it is entirely inconsistent with the evidence presented at trial. Williams v. State, 204 Ga. 837, 51 S.E.2d 825, 830 (1949).

The jury may convict of criminal attempt even though the crime was consummated, Ga. Code Ann. §26-1004, and despite the prosecutor's failure to charge the crime of attempt, Ga. Code Ann. §26-1005. It may convict of an assault with intent to commit a crime even though the crime was consummated, Ga. Code Ann. §26-1303.[19]

19/ Prior to 1968 the Georgia Criminal Procedure Code provided that a person could not be convicted of an attempt or of an assault with intent to commit a crime if the intended crime was actually perpetrated. Ga. Code Ann. §27-2508(1967). It had therefore been held that conviction of a lesser crime involving attempt was unauthorized where the evidence established that the attempt was consummated. See Hicks v. State, 86 Ga. App. 365, 71 S.E.2d 695 (1952); Pack v. State, 93 Ga. App. 737, 92 S.E.2d 824 (1956). The new Georgia Criminal Code provides, however, that "[a] person may be convicted of criminal attempt if the crime attempted was actually committed in pursuance of the attempt" (Ga. Code Ann. §26-1004) and that "[a] person may be convicted on [sic] an assault with intent to commit a crime if the crime intended was actually committed as a result of the assault." Ga. Code Ann. §26-1303. See, Jones v. Smith, 228 Ga. 648, 187 S.E.2d 298 (1972).

Similarly, dicta in older cases which suggest that conviction for the crime of robbery by intimidation would be unauthorized where the use of an offensive weapon had been proved, see e.g. Daniels v. State, 219 Ga. 381, 133 S.E.2d 357, 360 (1963), are seemingly superceded by 1968 amendments which removed the requirement that the crime of robbery by intimidation be committed without the use of such a weapon, compare former Ga. Code Ann. §26-2503(1967) with present §§26-1901 and 26-1902, and specifically provided that "[t]he offense robbery by intimidation shall be a lesser included offense in the offense of armed robbery." Ga. Code Ann. §26-1902.

The jury is thus given considerable unreviewable discretion -- contingent, of course, upon the exercise of discretion by the trial court in the choice of crimes on which the jury will be instructed[20] -- to convict a capital defendant of a lesser offense, not only in cases where the distinctions between crimes or degrees of offense are blurred, but also in cases where conviction of the lesser offense would be wholly inconsistent with the facts proved.

A jury may also be instructed to acquit on the basis of necessarily speculative and imprecise determinations regarding the state of the defendant's mind at the time of the crime. Acquittal is authorized when, at the time of the alleged crime, the defendant "lacked the mental capacity to distinguish between right and wrong," Ga. Code Ann. §26-702, suffered "a delusional compulsion . . . which overmastered his will," Ga. Code Ann. §26-703, or was acting on the basis of "a misapprehension of fact, which, if true, would have justified the act", Ga. Code Ann. §26-705.[21] Acquittal may also be based upon prescribed justifications, the determination of which involves not only findings as to the defendant's state of mind at the time of the crime, but also judgments as to the reasonableness of the defendant's conduct. Such judgments will inevitably vary with

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20/ See note 27, infra.

21/ Both rape, Ga. Code Ann. §26-2001, and kidnapping, Ga. Code Ann. §26-1311, involve acts committed "against [the] will" of the victim, and since consent would be a defense to both crimes, a defendant charged with rape or kidnapping might attempt to prove a "misapprehension of fact" justification with regard to consent.

the mores of the deciders. Justification is a defense defined in vague, subjective terms in a variety of enumerated situations (Ga. Code Ann. §§26-901(a)-(e), 902-904, 906) and is also allowed "[i]n all instances which stand upon the same footing of reason and justice as those enumerated . . . ." Ga. Code Ann. §26-902(f) (emphasis added). The fluid nature of these concepts, which are "notoriously refractory to the best-instructed human understanding,"[22] as Justice Cardozo recognized long ago when analyzing the distinction between first and second degree murder, affords the jury an indirect "dispensing power" of mercy vouchsafed them "in a mystifying cloud of words."[23]

22/ Black, Crisis in Capital Punishment, 31 MD. L. REV. 289,299 (1971).

23/ CARDOZO, LAW AND LITERATURE (1931) 99.

2. Sentencing Discretion

Once a Georgia defendant has been convicted of a capital crime, the sentencer has absolute discretion to impose a sentence of life imprisonment, since the procedure of finding "aggravating" and "mitigating" circumstances at the second stage of a bifurcated proceeding does not -- and was not intended to -- confine the unfettered power of the sentencer to spare the life of a sympathetic capital defendant.[24] See Furman v. Georgia, 408 U.S. 238, 401 (1972) (Mr. Chief Justice Burger, dissenting). The finding of a statutory "aggravating circumstance" and no "mitigating circumstances" does not compel a sentencing jury to impose a death sentence, because the statute also requires the jury to make a "recommendation of death," Ga. Code Ann. §§26-3102, 27-2534.1(c).[25]

24/ See C. Brewster, The Georgia Death Penalty Statute - Is It Constitutional, Even After Revision? 3 GA. J. CORR. 14, 18 (Winter, 1974).

25/ The intent of the statute to confer this discretion on the sentencing jury is made explicit by examination of Ga. Laws, 1973, p. 171, Act No. 74, which prohibits a trial judge from imposing a death sentence in a rape or kidnapping case after the defendant has pleaded guilty unless the trial judge finds one of the "statutory aggravating circumstances," but which also provides that the "judge . . . may, in his discretion, . . . sentence such person to life imprisonment, or to any lesser punishment authorized by law for the offense named in the indictment." Ibid. (emphasis added). Thus, although the trial judge may not sentence to death a defendant who pleads guilty without finding a "statutory aggravating circumstance," he still has complete unfettered discretion not to impose the death penalty. Plainly, the legislature intended the sentencing jury to exercise a similar discretion, for the procedure would otherwise be in violation of United States v. Jackson, 390 U.S. 570 (1968). See Comment, Constitutional Law-Capital Punishment-Furman v. Georgia and Georgia's Statutory Response, 24 MERCER L. REV. 891, 931 (1973).

The particular "aggravating circumstances" specified in the statute are extremely vague, all-encompassing, and open to different interpretations in like cases, depending upon the subjective judgment of the sentencer. Terms like "substantial history of serious assaultive criminal convictions," Ga. Code Ann. §27-2534.1(1), creation of a "great risk of death to more than one person," Ga. Code Ann. §27-2534.1(3), and use of a "weapon or device which would normally be hazardous to the lives of more than one person" id., are extremely imprecise and leave great freedom to the trial judge or jury to define their content. In addition to the great vagueness of these phrases, their coverage is extraordinarily broad. To allow the sentencer to impose a death penalty if the crime of rape or kidnapping is "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim," Ga. Code Ann. §27-2534.1(7), is potentially to authorize capital punishment for any rape or kidnapping.[26] Furthermore, the list

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26/ The great breadth of the new statute's potential coverage is also illustrated by the fact that one of the "statutory aggravating circumstances" found by the jury in this case (that the rape occurred during the course of a kidnapping) may be found in almost any rape case to justify a death sentence. Ga. Code Ann. §26-1311(a) provides that "[a] person commits kidnapping when he abducts or steals away any person without lawful authority or warrant and holds such person against his will." Since the new capital punishment statute enumerates "kidnapping" rather than "kidnapping for ransom," as defined in Ga. Code Ann. §26-1311(b), as a "statutory aggravating circumstance," it follows that the forcible detention and momentary abduction which are a part of almost any rape may qualify as a "kidnapping" which authorizes a sentencer to impose the death penalty. See Henderson v. State, 227 Ga. 68, 179 S.E.2d 76, 84-85 (1970).

The finding of an "aggravated battery" is also a "statutory aggravating circumstance" which justifies a jury's death verdict for the crime of murder. Ga. Code §26-1305 defines "Aggravated Battery" as follows:

of statutory "aggravating circumstances" is not exclusive or exhaustive, so that even if the foregoing "aggravating circumstances" did somehow curb the sentencer's discretion, the sentencer is still free to consider any "aggravating circumstances otherwise authorized by law." Ga. Code Ann. §27-2534.1(b). Exactly what this phrase means is obscure but it is clear that there is very little limitation on the nature or scope of evidence in aggravation which may be heard or considered.[27] While

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26/ cont'd.

> "A person commits aggravated battery when he maliciously causes bodily harm to another by depriving him of a member of his body, or by rendering a member of his body useless, or by seriously disfiguring his body or a member thereof."

It appears, therefore, that a jury would be justified in returning a death verdict in any murder case, on the basis of the existence of this "statutory aggravating circumstance."

27/ The ambiguous provisions of the statute which empower the trial judge to instruct upon aggravating and mitigating circumstances magnify the effect of the vagueness of the statutory circumstances themselves in jury trials. The trial judge "shall include" in his instructions "any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence." Ga. Code Ann. §27-2534.1(b) (emphasis added). Again, the trial judge is to give such "statutory instructions" as he determines "to be warranted by the evidence" in writing to the jury. Ga. Laws, 1973, p. 165, Act No. 74 (emphasis added). It is not certain whether "supported by the evidence" is equivalent to "warranted by the evidence" and, if it is, it is unclear what the standard is. The trial judge thus has an enormous discretion to present to the jury reasons to impose or not impose the death sentence in the case before it.

the statute sets forth certain factors in aggravation for the jury to consider, it nowhere directs that the jury may not consider other factors in aggravation. The statute does "no more than suggest some subjects for the jury to consider during its deliberations." McGautha v. California, 402 U.S. 183, 207 (1971).

The statute does not define "mitigating circumstances," and the sentencer is therefore free in any case to consider anything a mitigating factor which should justify mercy.[28] There is thus no case at all in which the sentencer might not conclude that some factual element was present which entitled the defendant to a lesser sentence than death.[29]

28/ There is no limitation, see Ga. Laws, 1973, p. 162, Act No. 74, upon the arguments which can be made by the defendant and prosecutor on the issue of punishment:

> "If the purpose of this Act is to strictly limit discretion in sentencing in capital cases, one wonders what must be the purpose of such a wide-open allowance of evidence and arguments in mitigation and aggravation . . . . If the state desires to comport with [Furman] . . . which indicated that . . . discretion might be greatly restricted by limiting considerations to specific, objective, statutorily-prescribed guidelines, why, then, should the hearing of arguments and evidence in mitigation and aggravation remain unrestricted?"

Comment, Constitutional Law-Capital Punishment-Furman v. Georgia and Georgia's Statutory Response, 24 MERCER L. REV. 891, 932 (1973) (emphasis in original).

29/ This was made clear in the instant case when the following colloquy occurred:

> "MR. ENGLISH[Petitioner's counsel]: Your Honor, this law does not spell out what is mitigating circumstances . . . .
>
> THE COURT: Well, mitigating circumstances would be anything that he could show in his own behalf -- in other words, to show mitigation."

T. 185.

In short, under the sentencing provisions of the new Georgia capital punishment statute, any case becomes a possible one for the death penalty or for life imprisonment, and total discretion is left to jurors and trial judges to determine whether any particular defendant shall be put to death. This statute is one in which "the legislature does not itself mandate the penalty in any particular class or kind of case (that is, legislative will is not frustrated if the penalty is never imposed), but delegates to judges and juries the decision as to those cases, if any, in which the penalty will be utilized." Furman v. Georgia, 408 U.S. 238, 310-311 (1972) (Mr. Justice White, concurring).[30]

30/ At the time of Furman v. Georgia, several states had limitations on the jury's discretion to make the life-death choice and standards for the appropriate exercise of that discretion. Death sentences from these states were nevertheless uniformly held unconstitutional. Davis v. Connecticut, 408 U.S. 935 (1972)(see Conn. Gen. Stat. Ann., §53-10); Moore v. Illinois, 408 U.S. 786 (1972)(see People v. Black, 367 Ill. 209, 10 N.E.2d 801, 804 (1937); People v. Sullivan, 345 Ill. 87, 177 N.E. 733 (1933); Ill. Rev. Stat., c. 38, §1-7-(c)(1)); Alvarez v. Nebraska, 408 U.S. 937 (1972)(see Sundahl v. State, 154 Neb. 550, 48 N.W.2d 689, 704 (1951)); Billingsley v. New Jersey, 408 U.S. 934 (1972) (see N. J. Stat. Ann., §2A:113-4(1969); State v. Reynolds, 41 N.J. 163, 195 A.2d 449 (1963)); Duling v. Ohio, 408 U.S. 936 (1972) (see State v. Tudor, 154 Ohio St. 249, 95 N.E.2d 385, 390 (1950); State v. Eaton, 19 Ohio St. 145, 249 N.E.2d 897 (1969)); Herron v. Tennessee, 408 U.S. 939 (1972)(see Tenn. Code Ann., §39-2405 (1955); Woodruff v. State, 164 Tenn. 530, 51 S.W.2d 843, 847 (1932)).

3. Post-Sentence Selective Mechanisms

i. Appellate Review

Although this Court, concurrently with Furman v. Georgia, and on its authority, reversed death sentences which had been reviewed by state appellate courts and affirmed on the express ground that the facts and circumstances warranted the extreme penalty,[3/] the Georgia legislature has apparently chosen to rely upon a similar review procedure as a response to Furman.

> "[T]he new statute provides for automatic and swift appellate review to insure that the death penalty will not be carried out unless the evidence supports the finding of one of the serious crimes specified in the statute. The statute also requires comparative sentencing so that if the death penalty is only rarely imposed for an act or it is substantially out of line with sentences imposed for other acts it will be set aside as excessive. And, finally, the statute requires this court to make certain the record does not indicate that arbitrariness or discrimination was used in the imposition of the death sentence."

31/ See e.g. Alford v. Eyman, 408 U.S. 939 (1972) (see State v. Alford, 98 Ariz. 124, 402 P.2d 551, 557 (1965); Ariz. Rev. Stat., §13-1717); Hurst v. Illinois, 408 U.S. 935 (1972) (see People v. Hurst, 42 Ill.2d 217, 247 N.E.2d 614 (1969)); Alvarez v. Nebraska, 408 U.S. 937 (1972) (see State v. Alvarez, 182 Neb. 358, 154 N.W.2d 746, 748 (1967); Neb. Rev. Stat., §29-2308); Fesmire v. Oklahoma, 408 U.S. 935 (1972) (see Fesmire v. State, 456 P.2d 573, 586-587 (Okla Ct. Cr. App. 1969)); Phelan v. Brierly, 408 U.S. 939 (1972) (see Commonwealth v. Phelan, 427 Pa. 265, 234 A.2d 540 (1967); cf. Commonwealth v. Heush, 358 Pa. 247, 56 A.2d 84, 85-86 (1948) with Commonwealth v. Edwards, 380 Pa. 52, 110 A.2d 216, 217 (1955)).

The Court reversed death sentences from these states even though these same state appellate courts had a regular and recent practice of reversing death sentences when such sentences were found to be unwarranted upon a consideration of aggravating and mitigating circumstances.

See e.g. State v. Maloney, 105 Ariz. 348, 464 P.2d 793 (1970); People v. Crosby, 42 Ill.2d 60, 244 N.E.2d 593 (1969); State v. [illegible], [illegible] P.2d 399 (Okla. Ct. Crim. App. 1969); Commonwealth v. Green, 396 Pa. 137, 151 A.2d 241 (1959).

Coley v. State, __Ga.__, 204 S.E.2d 512, 516 (1974). This review process whereby the Supreme Court of Georgia is asked to determine "[w]hether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor," "[w]hether . . . the evidence supports the . . . finding of a statutory aggravating circumstance," and "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar . . . cases, considering . . . both the crime and the defendant," Ga. Code Ann. §27-2537(c) in fact exacerbates the arbitrariness of capital sentencing.

First, the vagueness and breadth of the statutory "aggravating circumstances" means that the death penalty can be imposed in virtually any capital case, while the fact that "mitigating circumstances" are undefined means that the jury can find a reason to afford mercy to any capital defendant. Given this enormous statutorily-authorized sentencing discretion, it is difficult to see how the Georgia Supreme Court can determine whether "any . . . arbitrary factor" influenced the sentencing deliberations.

Second, the Georgia Supreme Court's reliance on cases that are appealed[32/] as a standard for determining whether a "sentence

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32/ The new Georgia statute requires a trial judge's report only in cases where a death sentence is actually imposed. Ga. Code Ann. §27-2537(a). The statute also directs the Georgia Supreme Court to "accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate," Ga. Code Ann. §27-2537(f). Preparation of a formal appellate "record" occurs, of course, only in those cases which are appealed, and it is purely fortuitous whether defendants sentenced to life in cases factually like those of any particular condemned defendant will choose to appeal. In the three death sentences thus far reviewed by the Georgia

of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant," Ga. Code Ann. §27-2537(c)(3), will provide no reliable guide to whether the death penalty is being uniformly imposed under similar factual circumstances. A comparative sample consisting only of cases appealed to the Georgia Supreme Court is drastically skewed in two ways. Otherwise eligible cases are ignored which involve similar factual circumstances but which were disposed of by various selective mechanisms described above (for example, the case of a co-defendant convicted of assault with intent to rape). See pp. 25-31, supra. No account is taken of those capital crime convictions where a life sentence is imposed and no appeal is taken (for example, the case of a co-defendant who pleaded guilty to rape in return for a life sentence). The myopia inherent in this scheme will prevent ascertainment of the penalties normally imposed in particular circumstances.[33]

32/ cont'd.

Supreme Court, the required list of "similar cases which [the Court] . . . took into consideration," Ga. Code Ann. §27-2537(e), has contained only capital convictions which were subjected to appellate review. See Coley v. Georgia, __Ga.__, 204 S.E.2d 512, 618 (1974); House v. State, __Ga.__, 205 S.E.2d 217, 222-223 (1974); Eberheart v. State, __Ga.__, 206 S.E.2d 12, 18 (1974) (App.A at 7a).

33/ See C. Brewster, The Georgia Death Penalty Statute -- Is It Constitutional, Even After Revision? 3 GA. J. CORR. 14, 19 (Winter, 1974) for hypothetical examples of the inequities produced by this form of appellate review.

Third, the appellate review provisions of the new statute explicitly authorize comparison of death sentences with sentences in pre-Furman v. Georgia cases tried under procedures which this Court has already condemned because they lent themselves to arbitrary and discriminatory application. The Georgia Supreme Court is directed to consider "capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate," Ga. Code Ann. §27-2537(f), and all but one of the cases listed in the "Similar cases considered by the court" appendices of the three death cases reviewed by the Georgia Supreme Court under the new statute were decided under statutes whose death penalty procedures were invalidated by Furman v. Georgia.[34] The result, of course, is a perpetuation of the Eighth Amendment arbitrariness condemned by this Court on June 29, 1972. For post-Furman v. Georgia, death sentences are affirmed or reversed on the basis of their conformity with a "standard" consisting of cases in which the death penalty was "wantonly and . . . freakishly imposed," Furman v. Georgia, supra, at 310 (Mr. Justice Stewart concurring), at a time when "there [was] . . . no meaningful basis for distinguishing the few cases in which it [was] . . . imposed from the many

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34/ See Coley v. Georgia, __Ga.__, 204 S.E.2d 512, 618 (1974); House v. State, __Ga.__, 205 S.E.2d 217, 222-223 (1974); Eberheart v. State, __Ga.__, 206 S.E.2d 12, 18 (1974) (App.A at 7a).

The Coley case itself, listed in the Eberheart appendix, is the only case cited which was not decided under capital procedures which this Court held invalid in Furman because they lent themselves to arbitrary and discriminatory imposition of the death sentence.

cases in which it [was] . . . not," id. at 313 (Mr. Justice White concurring) and when "the discretion of judges and juries in imposing the death penalty enable[d] the penalty to be selectively applied, feeding prejudices against the accused if he [were] . . . poor and despised, lacking political clout, or if he [were]. . . a member of a suspect or unpopular minority." Id. at 255 (Mr. Justice Douglas, concurring).

Finally, the Georgia Supreme Court's failure to provide reasoned opinions in support of its sentence review decisions makes it impossible to determine whether this procedure is fulfilling its ostensible purpose. For in petitioner's case, and in the two other death cases the Court has reviewed under the new statute, the Court has merely asserted that a particular death sentence did (or did not) pass muster under the statutory standards. 35/

35/ The Georgia Supreme Court merely made the conclusory statement that petitioner's death sentence was appropriate under the new statute:

> "In accord with the statutory mandate we have reviewed the trial transcript and record including the evidence and made a comparison with the evidence and sentences in similar cases. Those similar cases we considered in reviewing the case are listed in an appendix attached to this opinion. Using the standards prescribed for our review by the statute, we conclude that the sentences of death imposed in this case were not imposed under the influence of passion, prejudice or any other arbitrary factor, and the evidence supports the jury's finding of statutory aggravating circumstances. Considering both the crime and the defendant, and after comparing the evidence and sentences in this case with that of previous cases, we conclude the sentences of death are not excessive or disproportionate to the penalty imposed in similar cases."

[illegible], __Ga.__, 206 S.E.2d 12, 18 (1974) (App. A at [illegible]). At the end of its opinion, the Court attached the following appendix:

In each case, the Court provided a list of cases it had "considered," but it did not articulate any principles which would rationalize the cases, indicate what elements of the case under review mandated (or did not mandate) a death sentence, describe the factual circumstances in cases where the appellate report does not disclose them, explain why certain other cases were not considered, or demonstrate how the facts of the case under review merited a harsher sentence than had been imposed in other cases where

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35/ cont'd.

> "Similar cases considered by this court: Miller v. State, 224 Ga. 627, 163 S.E.2d 730; Henderson v. State, 227 Ga. 68, 179 S.E.2d 76; Ford v. State, 227 Ga. 279, 180 S.E.2d 545; Watson v. State, 227 Ga. 698, 182 S.E.2d 446; Lumpkin v. State, 228 Ga. 391, 185 S.E.2d 770; Fuller v. State, 228 Ga. 546, 186 S.E.2d 888; Allen v. State, 228 Ga. 859, 188 S.E.2d 793; Griffin v. State, 229 Ga. 165, 190 S.E.2d 61; Hobbs v. State, 229 Ga. 556, 192 S.E.2d 903;McCrary v. State, 229 Ga. 733, 194 S.E.2d 480; Grantling v. State, 229 Ga. 746, 194 S.E.2d 405; Massey v. State, 229 Ga. 816, 195 S.E.2d 28; Akins v. State, 231 Ga. 411, 202 S.E.2d 62; Coley v. State, 231 Ga. 829, 204 S.E.2d 612."

206 S.E.2d at 18 (App. A at 72).

apparently more aggravated crimes had received lighter sentences.[36]

36/ Cf. e.g. Penland v. State, 229 Ga. 256, 190 S.E.2d 900 (1972) (appellant received twenty year sentence for rape and aggravated sodomy; when law enforcement officers found the victim:

> "she was almost nude; . . . her head was a complete mass of blood and her body was covered with mud, cuts, and bruises, . . . her eyes were swollen shut; . . . she was incoherent . . . The victim testified in detail as to what had occurred, relating that the defendant by threats and by beating her with his hands, a stick, and a tire tool, forced her to submit to several acts of each of the offenses."

190 S.E.2d at 900-901); Riggins v. State, 226 Ga. 381, 174 S.E.2d 908 (1970) (life sentence for rape reversed for trial error: the "evidence show[ed] the victim was brutally beaten, abused and raped by the [appellant]" and that she was taken to a hospital and "was treated for extensive physical injuries" shortly after the rape. 174 S.E.2d at 912); Bussie v. State, 230 Ga. 440, 197 S.E.2d 344 (1973) (appellant given ten year sentence for rape of ten year old child: victim testified that appellant "placed a knife against her neck and took her to a railroad box car and raped her," 197 S.E.2d at 344); Ford v. State, 227 Ga. 279, 180 S.E.2d 545 (1971) (life sentence for rape: appellant was one of three men committing rape; victim left "disheveled," "hysterical," and suffering "abrasions in the area at the opening of the vagina," 180 S.E.2d at 547); Griffin v. State, 229 Ga. 165, 190 S.E.2d 61 (1972) (life sentence for rape: victim was abducted and "forcibly raped in rapid succession by four or five men, including the [appellant]," 190 S.E.2d at 63); Hobbs v. State, 229 Ga. 556, 192 S.E.2d 903 (1972) (life sentence for rape: appellant found guilty of perpetrating a rape which resulted in "bruises, scratches, abrasions about the [victim's] face, neck and other parts of her body," 192 S.E.2d at 907); Watson v. State, 227 Ga. 698, 182 S.E.2d 446 (1971) (life sentence for rape: appellant subdued his victim with a pistol, handcuffed her to the bed, and raped her: "[s]everal witnesses [described her] as crying, [with] her hair ruffled up, emotionally upset, with bleeding handcuff marks on her hands," 182 S.E.2d at 449). Cf. also Teague v. State, 208 Ga. 459, 67 S.E.2d 467, 469 (1951); Martin v. State, 207 Ga. 482, 62 S.E.2d 158 (1950); Jones v. State, 213 Ga. 814, 102 S.E.2d 21 (1958); Stevens v. State, 222 Ga. 603, 151 S.E.2d 127 (1966); Coleman v. State, 215 Ga. 865, 114 S.E.2d 2 (1960). Of course, these cases may be distinguishable on the basis of facts unascertainable from the reported appellate decisions or by a logic that is not apparent and has not been spelled out by the Georgia Supreme Court. But surely a sentencing-review system is inadequate if it relies on comparisons involving unknowable facts mediated by unarticulated principles. See pp. 49-50, infra.

ii, Executive Clemency.

The capital defendant who fails to escape the death penalty during the charging, plea bargaining, guilt determination, and sentencing processes is subjected to a final lottery in which the Executive Department (the three members of the Board of Pardons and Paroles acting with the consent of the Governor) has absolute discretion to spare his life or permit his execution. Georgia Constitution, art. V, §2-3011, par. XI, Ga. Code Ann. §77-511. There are no standards whatsoever for the exercise of the commutation power, and the state courts have "no jurisdiction" to review the grant or denial of a commutation in a death case. Parks v. State, 206 Ga. 675, 58 S.E.2d 142, 145 (1950). In the eighteen years between 1946 and 1963, 41 of 187 condemned prisoners (22%) were spared by executive clemency.[37] In view of the precipitous decrease in the number of executions over the past few decades, it appears reasonable to assume that under the new Georgia death penalty statutes, a significant number of those defendants condemned to die will be spared through the exercise of the freakish mercy of executive clemency.

The preceding review of the post-Furman v. Georgia modifications in Georgia's capital procedures reveals that discretionary opportunities for imposition or avoidance of the penalty are,

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37/ Note, Executive Clemency in Capital Cases, 39 N.Y.U. L. REV. 136, 192 (1964).

in fact, as numerous and as unregulated as in the pre-June 29, 1972 period. It is not surprising that only a handful of defendants have been condemned (17 in 16 months)[38] in a State which reported 871 murders and non-negligent manslaughters, 984 forcible rapes, and 6,340 robberies in the twelve months of 1972.[39] Of course, the point is not only that the death penalty continues to be imposed so rarely in such an insignificant fraction of eligible cases that its regular and even-handed use and its general acceptance as a functioning part of the State's criminal law machinery are called into question. The more fundamental defect is that the arbitrary selectivity condemned in Furman v. Georgia has been carefully preserved in Georgia's modified capital procedures. After Furman, Georgia "was confronted with the serious task of devising a new . . . system consonant with her own political ideas but also consistent with the Federal Constitution." Lane v. Wilson, 307 U.S. 268, 275 (1938). The question now presented for this Court's consideration is whether the 1973 statute "partakes too much of the infirmity" of the pre-Furman v. Georgia system "to be able to survive." Ibid.

This question is important both to the prisoners condemned under the new Georgia statute and to the resolution of constitutional questions of broad national significance. For the Georgia legislation represents one of the major devices used by retentionist states to avoid the effect of the Furman ruling. Several states have devised more or less elaborate procedures involving "aggravating" and "mitigating" circumstances -- much like those of Georgia described in subsection 2, supra -- for the exercise of disguised arbitrary selectivity in sentencing. Other states, such as North Carolina, have adopted "mandatory" death penalties for grades or kinds of offenses but have built significant discretionary elements into the definition of these capital classifications and have taken no steps to control the kinds of arbitrary selectivity described in subsections 1 and 3, supra. By granting review in this case, and in cases pending on certiorari to the Supreme Court of North Carolina,[40] this Court will have an opportunity to consider the full range of devices now being used in the attempt to reinstitute the death penalty after Furman v. Georgia despite strong national resistance to its frequent and routine application.

38/ See note 5, supra.

39/ UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 1972 (1973) at 69. These totals are reported crimes, not convictions, and they cannot be said to represent the total of murders, rapes, and robberies reported in Georgia in 1972 for which a death sentence might be imposed. The FBI Uniform Crime Reports do not tabulate statistics for reported acts of kidnapping, treason, and aircraft hijacking.

40/ Hilliard v. North Carolina, No. 73-6875 (filed June 11, 1974); Henderson v. North Carolina, No. 73-6853 (filed June 8, 1974); Noell v. North Carolina, No. 73-6876 (filed June 11, 1974); Jarrette v. North Carolina, No. 73-6877 (filed June 11, 1974); Crowder v. North Carolina, No. 73-6878 (filed June 11, 1974); Fowler v. North Carolina, No. 73-7031 (filed July 9, 1974); Honeycutt v. North Carolina, No. 73-7032 (filed July 9, 1974).

APPENDIX C

Pp. 45-51, Petition for Certiorari, Dillard v. North Carolina, No. 73-6875 (filed June 11, 1974).

D. The Inconsistency Of The Death Penalty With Contemporary Standards of Decency

Eighth Amendment standards are not static, and the prohibitions of the cruel-and-unusual punishment clause are not "confine[d] . . . to such penalties and punishments as were inflicted by the Stuarts." Weems v. United States, 217 U. S. 349, 372 (1910). Instead, the clause is "progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice," Id. at 378, and informed by "the light of contemporary human knowledge." Robinson v. California, 370 U. S. 660, 666 (1962). There was no disagreement among the Justices who reached the issue in Furman v. Georgia that this evolutionary standard authorized the periodic Eighth Amendment re-evaluation of hoary criminal punishments. See Furman v. Georgia, supra, at 242 (opinion of Mr. Justice Douglas); at 264-269 (opinion of Mr. Justice Brennan); at 325-328 (opinion of Mr. Justice Marshall); at 383 (opinion of Mr. Chief Justice Burger); at 409 (opinion of Mr. Justice Blackmun); at 429 (opinion of Mr. Justice Powell). Such a re-evaluation of the penalty of death is particularly appropriate at this historical juncture, for three principal reasons:

First: The cruelty and inutility of the death penalty are apparent in an age when "contemporary human knowledge," draws upon advanced medical science and sciences of human behavior. We are no longer so uninformed about the complex sources and motivations of anti-social behavior as to maintain the simplistic and beguiling notion that the threat of death deters serious crime; nor can we ignore today the the truism that government remains "the potent, the omnipresent teacher"[46/] even when it chooses to

46/ Olmstead v. United States, 277 U. S. 438, 485 (1928) Justice Brandeis, dissenting).

teach the overriding lesson of capital punishment "'that a man's life ceases to be sacred when it is thought useful to kill him.'"[47] While we have not abandoned the essential moral and social proposition that the citizen is responsible to society for his or her conduct, new knowledge of the subtle springs of human behavior has led to a reconsideration of the justifications for retributive punishments,[48] a partial diminution of retributive sentiment, and a guarded, but increased optimism about the possibilities of rehabilitation. At the same time, society has developed sophisticated means for safely isolating dangerous criminal offenders.

To the extent that contemporary human knowledge casts doubt on the utility of capital punishment in achieving the legitimate aims of criminal sanctions, it casts doubt on the legitimacy of capital punishment in Eighth Amendment terms. If it cannot be established that the death penalty is a superior deterrent, and if it cannot be shown that the death penalty is necessary to isolate dangerous offenders, reinforce moral standards of (if retribution

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47/ Camus, Reflections on the Guillotine, in CAMUS, RESISTANCE, REBELLION AND DEATH 173, 229 (1961).

48/ ". . . a cloud of doubt has settled over the keystone of 'retributive' theory. Its advocates can no longer speak with the old confidence that statements of the form 'This man who has broken a law, could have kept it' had a univocal or agreed meaning; or where scepticism does not attach to the meaning of this form of statement, it has shaken the confidence that we are generally able to distinguish the cases where a statement of this form is true from those where it is not." H.L.A. Hart, PUNISHMENT AND RESPONSIBILITY (1968), at 1.

is considered a legitimate aim of penal sanctions) a civilized society's measure of justice, then it is surely impossible for any governmental organ to justify the decision made below by a single vote of the North Carolina Supreme Court: to "extinguish, after untellable suffering, the most mysterious and wonderful thing we know, human life."[49] Mr. Justice White wrote in Furman that:

> "The imposition and execution of the death penalty are obviously cruel in the dictionary sense. But the penalty has not been considered cruel and unusual punishment in the constitutional sense because it was thought justified by the social ends it was deemed to serve. At the moment it ceases realistically to further these purposes, however, the emerging question is whether its imposition in such circumstances would violate the Eighth Amendment." 408 U. S. at 312.

At a time when the death penalty is and inevitably will continue to be rarely imposed, and when empirical data fail to substantiate that its imposition is "of substantial service to criminal justice" (id. at 313) in any case, the question is squarely presented whether death as a punishment for crime is consistent with any morality that our society can forthrightly accept.

Second: The rarity with which the death penalty is imposed today signifies repudiation of its regular use. The Court in Furman confronted an accepted system which sent an exceedingly small number of persons[50]--who were, for the most part, members of

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49/ Black, Crisis in Capital Punishment, 31 MD. L. REV. 289, 291 (1971).

50/ "The most salient characteristic of capital punishment is that it is infrequently applied . . . [A]ll available data indicate that judges, juries and governors are becoming increasingly reluctant to impose or authorize the carrying out of a death sentence." PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND

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powerless or despised minorities--to die in secret for crimes punished less severely in the vast majority of cases.

> "[T]oday society will inflict death upon only a small sample of the eligible criminals. Rejection could hardly be more complete without becoming absolute." Furman v. Georgia, supra, at 309 (Brennan, J. concurring).

The Furman majority rightfully looked to what the public conscience will allow the law to do, as opposed to what it will permit the law to threaten. In the words of Mr. Justice Brennan, "The objective indicator of society's view of an unusually severe punishment is what society does with it." 408 U. S. at 300 (emphasis added). A punishment which is tolerated only because it is rarely imposed, or because the facts and circumstances surrounding its imposition and the evidence of its inutility are generally unknown, or because it is imposed only upon the powerless and members of outcast groups, is not a punishment consistent with contemporary morality. Even in those states which have enacted new capital punishment legislation since Furman, the imposition of the

50/ (Cont'd)
ADMINISTRATION OF JUSTICE. REPORT (THE CHALLENGE OF CRIME IN A FREE SOCIETY) (1967), p. 143.
The extent to which this is true appears upon inspection of the highly reliable figures on executions maintained by the Federal Bureau of Prisons since 1930. Of the 3,859 persons executed under civil authority in the United States between 1930 and 1968, only 191 were executed during the 1960's and only 25 were executed after 1963. No one has been executed in the United States since 1967. UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, Bulletin No. 46, Capital Punishment 1930-1970 (August 1970).

51/ Justice Douglas quoted the conclusion of the President's Commission on Law Enforcement and Administration of Justice that "'the death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups.'" Furman, supra, at p. 249. See also the concurring opinions of Justice Stewart, at p. 310, and Justice Marshall, at pp. 364-366. Justice Marshall noted that "American citizens know almost nothing about capital punishment." Indeed, ignorance of the details of execution is insured by law in that every American jurisdiction now

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death penalty remains, and must continue to remain, a freakishly rare occurrence. Indeed, even in the State of North Carolina, where for fourteen months a purportedly "mandatory" death sentence was put into effect for four relatively common crimes, the number of death sentences was so low that it is impossible to conclude that the penalty was being in a fraction of the cases to which it was theoretically applicable. The legitimacy of its application in a manner which no honest mind can doubt will continue to be freakishly rare in this country--if it continues at all--is therefore called into question.

Third: The growing reluctance to allow the state to take the life of any human being and the absolute refusal to require or tolerate general application of the death penalty reflect not only an increased awareness of the inutility of the punishment, but also a moral development which has produced an increased respect for life and a concomittant revulsion against inflicting the physical and psychological torture of condemnation, inevitably lengthy death row confinement and execution. 52/ Increased respect for

51/ (Cont'd)
forbids public executions. Movements to Abolish the Death Penalty in the United States, 284 ANNALS 124, 127-130 (1952).

52/ ". . . the struggle about this punishment has been one between ancient and deeply rooted beliefs in retribution, atonement or vengeance on the one hand, and, on the other, beliefs in the personal value and dignity of the common man that were born of the democratic movement of the eighteenth century, as well as beliefs in the scientific approach to an understanding of the motive forces of human conduct, which are the result of the growth of the sciences of behavior during the nineteenth and twentieth centuries." SELLIN, THE DEATH PENALTY (1959) 15.

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life and increased respect for the dignity of man inevitably increase the awesomeness of the notion of condemnation and execution. Thus executions, which were once routine occurrences, had ceased for a period of five years even prior to Furman as this nation agonized over the prospect of their resumption and over the inevitable and sobering possibility that human error or a denial of due process could send a man to his death.[53/]

The enormity of the process forbids its resumption without the prior judgment of this Court. If, after a lapse of seven years, the United States is going to return to killing people, this Court should first consider under the relevant Eighth Amendment standards all that that implies.

It is incontrovertible that an impending execution inflicts severe psychological anguish and mental pain upon a condemned man.

Under a legal system which postpones execution for periods measured in years in an attempt to assure its conformity with due process of law, the wait between the imposition of sentence and the actual infliction of death exacts a severe toll.

As the California Supreme Court has pointed out,"the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture." People v. Anderson, 6 Cal.3d 628, 493 P.2d 880, 894 (1972).

53/ See Black, "The Crisis in Capital Punishment" 31 MD. L. REV. 290, at 295-300 (1971).

6C

The condemned prisoner, even more than the expatriate, is subjected to the "fate of ever-increasing fear and distress." Trop v. Dulles, 356 U. S. 86, 102 (1958) (plurality opinion of Chief Justice Warren). The stress of awaiting execution frequently produces insanity, see Solesbee v. Balkom, 339 U. S. 9, 14 (1950) (Justice Frankfurter, dissenting), or other extreme manifestations of psychological compensation.

Moreover, existing data suggests what imagination intuits: there is likely to be unmeasurable physical pain before consciousness is lost. "Although our information is inconclusive, it appears that there is no method available that guarantees an immediate and painless death." Furman v. Georgia, supra, at 287 (Mr. Justice Brennan concurring).

And there is, finally the enormity and irreversibility of the act of condemning and terminating a human existence -- an act which denies absolutely the very thing which the Eighth Amendment was created to protect: the dignity of man.

The moral development which has accompanied advances in understanding of the causes and control of crime and which is reflected in the increasing world-wide disinclination to impose the punishment of death calls upon this Court now to consider the question of the legitimacy of that punishment under the Eighth Amendment's measure: "the evolving standards of decency that mark the progress of a maturing society."[54/]

54/ Trop v. Dulles, 356 U. S. 86, 100 (1958) (plurality opinion of Chief Justice Warren).

7C

APPENDIX D

Pp. 49-58, Petition for Certiorari, Eberheart v. Georgia, No. 74-5174 (filed August 19, 1974).

II. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE PROVISIONS FOR APPELLATE REVIEW OF DEATH SENTENCES ESTABLISHED BY THE NEW GEORGIA CAPITAL PUNISHMENT STATUTE, GEORGIA LAWS, 1973, PP. 159-172, ACT NO. 74, VIOLATE THE RIGHTS OF AN INDIGENT DEFENDANT TO THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES AND TO THE DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

The preceding section of this Petition considered the incapacity of Georgia's new appellate review procedures to control or correct the arbitrary capital sentencing practices perpetuated by the State's 1973 death penalty statute in the teeth of Furman v. Georgia. Those appeal procedures are so defective as to raise, in addition, fundamental issues of due process and equal protection and of denial to death-sentenced defendants of the effective assistance of "counsel acting in the role of an advocate," Anders v. California, 386 U.S. 738, 743 (1967), on the question of life or death.

The Georgia Supreme Court is statutorily directed to determine whether a death sentence has been "imposed under the influence of passion, prejudice, or any other arbitrary factor," whether "the evidence supports the jury's or judge's finding of a statutory aggravating circumstance," and "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Ga. Code Ann., §27-2537(c). This mandate

involves the extraordinary feature of an appellate "review" that imports an issue not decided by the lower court and introduces a standard for decision of the appeal which is neither utilized nor utilizable at the trial. For, whereas the Georgia statute nowhere provides any mechanism by which sentencing judges or juries are to ascertain the facts of any cases other than the one before them or to compare that one case with any others, the Georgia Supreme Court is instructed to "accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate," Ga. Code Ann., §27-2537(f); it is authorized to employ a legal assistant to "provide the court with whatever extracted information it desires with respect [to such cases] . . . , including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant," ibid.; and the Georgia Supreme Court, after comparing a condemned appellant's case with "similar cases," Ga. Code Ann. §27-2537(c)(3), is required to "include in its decision a reference to those similar cases which it took into consideration," Ga. Code Ann., §27-2537(e).

Whether or not the Georgia Supreme Court has in fact accumulated records in any or all capital cases -- of what vintage they may be -- whether it has had a legal assistant make any synopses, briefs or extracts -- and, if so, what facts and conclusions they contain -- are all unknown and unknowable. In the three capital cases that it has so far reviewed under the statute, the Georgia Supreme Court has said nothing of any of this, contenting itself with appending to its opinion a list of

earlier cases which it recites that it has "considered."[44] All of those cases are convictions from which appeals were taken resulting in reported decisions, but (1) they do not include all reported decisions in cases of convictions for the particular crime in question following any particular ascertainable date;[45] (2) they include some reported opinions in which the facts surrounding the offense are set forth at length[46] and many in

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44/ See pp. 41-43, supra.

45/ The appendices to the Georgia Supreme Court's opinion in Coley v. State, __Ga.__, 204 S.E.2d 512 (1974) and in petitioner's case did not cite the following rape cases: Penland v. State, 229 Ga. 256, 190 S.E.2d 900 (1972); Riggins v. State, 226 Ga. 381, 174 S.E.2d 908 (1970); Bussie v. State, 230 Ga. 440, 197 S.E.2d 344 (1973); Williams v. State, 226 Ga. 140, 173 S.E.2d 182 (1970); Walker v. State, 226 Ga. 202, 174 S.E.2d 440 (1970). The appendix to the Georgia Supreme Court's opinion in House v. State, __Ga.__, 205 S.E.2d 217 (1974) did not cite the following murder cases: Parks v. State, 230 Ga. 157, 195 S.E.2d 911 (1973); Evans v. State, 227 Ga. 571, 181 S.E.2d 845 (1971); Fisher v. State, 228 Ga. 98, 184 S.E.2d 156 (1971); Banks v. State, 227 Ga. 578, 182 S.E.2d 106 (1971).

46/ See e.g. Watson v. State, 227 Ga. 698, 182 S.E.2d 446 (1971), listed in the appendix to the Georgia Supreme Court's decision in the Coley case and in petitioner's case.

which the facts are described sketchily or not at all;[47] (3) they consist primarily of pre-Furman convictions and sentences and therefore of cases tried under a non-bifurcated procedure in which it would have been wholly adventitious had facts concerning "the defendant"as well as "the crime" been adduced; and (4) the Georgia Supreme Court has not only failed to state the relevant facts of those cases, but has also failed to describe from what source or sources (the appellate opinion, the trial transcript, the trial judge's "report,"[48] the entire trial-court file) it derived those facts.

Such a method of adjudication falls woefully short of anything this Court has ever countenanced in any form of proceeding -- criminal, civil, or administrative -- conducted subject to the Constitution. Several distinct but related constitutional guarantees are flouted here:

First, counsel representing a condemned defendant cannot fairly acquire knowledge of the identity or the facts of the "similar cases" which the Georgia Supreme Court is statutorily

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47/ See e.g. McCrary v. State, 229 Ga. 733, 194 S.E.2d 480 (1972); Miller v. State, 224 Ga. 627, 163 S.E.2d 730 (1968); Grantling v. State, 229 Ga. 746, 194 S.E.2d 405 (1972); Fuller v. State, 228 Ga. 546, 186 S.E.2d 888 (1972); Akins v. State, 231 Ga. 411, 202 S.E.2d 62 (1973), listed in the Appendix to the Georgia Supreme Court's decision in the Coley case and in petitioner's case.

48/ See p. 23, supra.

required to compare to his for the purpose of determining whether his client lives or dies. Neither published opinions nor any other accessible source will enable him to locate in a systematic and comprehensive fashion all of the "similar cases" that should be called to the court's attention by briefing and argument; and, even were the cases somehow to be located, counsel would have no practicable way of obtaining the facts about them that are available to the court, or of knowing or affecting the view that the court takes of those facts or their interpretation or significance.

Counsel for indigent condemned men like petitioner Eberheart are, of course, uniquely disadvantaged, since they lack the resources that would be available to a defendant with means to purchase copies of transcripts in dozens of capital cases for research and comparison. They are therefore denied "the basic tools of an adequate defense or appeal [which] . . . are available for a price to other prisoners," Britt v. North Carolina, 404 U.S. 226, 227 (1971)(dictum), and are denied the equal protection of the laws demanded by an unbroken line of this Court's decisions from Griffin v. Illinois, 351 U.S. 12 (1956), through Mayer v. City of Chicago, 404 U.S. 189 (1971). Lacking access to the "records" which the Georgia Supreme Court will review for comparative purposes, the indigent's statutory right of appellate review of his death sentence (cf. Ross v. Moffitt, 42 U.S.L.W. 4940 (U.S., June 17, 1974)) is reduced to a "meaningless ritual." Douglas v. California, 372 U.S. 353, 358 (1963).

But even for a defendant with means, the appeal of a death sentence involves arguing to the Georgia Supreme Court comparisons of unknown facts under unknowable standards. What synopses of briefs of what versions of what facts in comparative cases are before the court remains unknown to counsel; and the court's standards of comparison as revealed by its opinions and its "Cases Considered" appendices in decisions rendered under the statute (see pp.38-42, supra, at notes 32-35) are about as intelligible as a Roman Emperor's gesture of thumbs-up or thumbs-down beside the arena. "This will never do if hearings and appeals are to be more than empty forms." Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 303 (1937). A judgment based upon "undisclosed sources of information unavailable to others," West Ohio Gas Co. v. Public Utilities Commission (No. 1), 294 U.S. 63, 69 (1935), makes "[t]he right to submit argument . . . a barren one," Morgan v. United States, 304 U.S. 1, 18 (1938), and denies the "'prime requirement of any fair hearing,'" Gonzales v. United States, 348 U.S. 407, 416 (1955). See, e.g. United States v. Abilene & Southern Railway Co., 265 U.S. 274, 286-290 (1924). This sort of procedure not only offends "'the rudiments of fair play,'" West Ohio Gas Co. v. Public Utilities Commission (No. 1), supra, at 71, but also so completely disables counsel from effective representation of his client on the death penalty issue that it destroys the Sixth Amendment right "in any substantial sense," Powell v. Alabama, 287 U.S. 45, 58 (1932). Cf. Ferguson v. Georgia, 365 U.S. 570

(1961); Brooks v. Tennessee, 406 U.S. 605 (1972).[49]

Second, the "similar cases" used by the Georgia Supreme Court for comparison under its statutory mandate consist largely (13 of the 14 cases cited in the "Cases Considered" appendix to the Georgia Supreme Court's opinion in petitioner's case)[50] of sentences meted out by Georgia juries and judges in capital cases prior to Furman -- that is, during a time when, as this Court has already decided, wholly arbitrary capital sentencing discretion was being exercised. Such a practice "calls to life the very conditions which [Furman purported] . . . to destroy," Guinn v. United States, 238 U.S. 347, 361 (1915), and is therefore unconstitutional. Cf. Lane v. Wilson, 307 U.S. 268 (1939).

Third, the universe of cases used for comparison is manifestly irrational. Those cases consist of capital prosecutions in which "records" are available -- which means, as a practical matter, only prosecutions in which appeals were taken, since the

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49/ It is true that this denial occurs at what is nominally the appeal, rather than the trial, of a capital prosecution. However, as was pointed out at p. 50, supra, Georgia procedure makes the Georgia Supreme Court the court of first resort, as well as the court of last resort, for presentation and decision of questions of comparison between a capital defendant's case and "similar cases" for death-sentencing purposes; and it is not conceivable that the Sixth and Fourteenth Amendments could fail to require effective assistance of counsel at this literally vital juncture.

50/ See note 35, supra.

stenographic notes of trial testimony are not transcribed except in the event of an appeal. The upshot is that one capital defendant convicted and sentenced to die may secure a reversal of his death sentence by the Georgia Supreme Court because his case is factually akin to two or three others in which convictions resulting in life sentences were appealed to that Court; whereas another condemned defendant will not secure the reversal of his death sentence notwithstanding the close factual similarity of his case to two or three unappealed convictions resulting in life sentences -- the critical difference in the comparative base depending entirely upon the fortuitous existence of appealable issues relating to guilt in various capital cases with which the particular defendant whose life is at stake has no connection.

Furthermore, in the matter of comparison the cards are stacked in favor of death because the new Georgia statute requires factual findings and a trial judge's report only in cases where a death sentence is imposed, so that the record is more complete in death cases than in life cases whose similarities to a particular condemned defendant's case may be concealed by the absence of findings resolving evidentiary disputes. And, although the Georgia statute requires comparison with "similar cases, considering both the crime and the defendant," Ga. Code Ann., §27-2537(c)(3), the great bulk of cases used for comparative purposes on petitioner's appeal were pre-Furman cases tried under an unitary trial procedure in which evidence relating to "the defendant" apart from "the crime" was admitted haphazardly and

fortuitously in some prosecutions and entirely excluded in others. See, e.g., Knowlton, Problems of Jury Discretion in Capital Cases, 101 U.PA. L. REV. 1099 (1953); Handler, Background Evidence in Murder Cases, 51 J. CRIM. L., CRIM. & POL. SCI. 317 (1960).

These practices raise significant constitutional issues because the Equal Protection Clause denies "to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute," Reed v. Reed, 404 U.S. 71, 75-76 (1971); see also, e.g., Baxstrom v. Herold, 383 U.S. 107 (1966); James v. Strange, 407 U.S. 128 (1972); and the Due Process Clause forbids adjudication of substantial rights on the basis of factual determinations that are not rationally related to the purposes for which the adjudication is made, e.g., Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Leary v. United States, 395 U.S. 6 (1969); Turner v. United States, 396 U.S. 398 (1970). It is no answer to the guarantees of these Clauses that it may be easier or cheaper for the State to make irrational judgments than to undertake the trouble of making rational ones. Rinaldi v. Yeager, 384 U.S. 305 (1966); and see Memorial Hospital v. Maricopa County, 42 U.S.L.W. 4277 (U.S., February 26, 1974). Most imperatively where human life is at issue, a State's procedures for determining when it shall be taken away are required by the Constitution to

exhibit some rational relationship to their professed objectives. If the objective of Georgia's appellate review procedures in capital cases is what the State professes -- to assure regularity and even-handedness in death sentencing and thus to terminate the earlier Georgia practice under which there existed "no meaningful basis for distinguishing the few cases in which [the death penalty was] . . . imposed from the many cases in which it [was] . . . not," Furman v. Georgia, 408 U.S. 238, 313 (1972) (Mr. Justice White, concurring), then the form of those review procedures is palpably irrational in the light of that objective. The only other objective in view -- one to which, admittedly, the new review procedures are quite rationally related -- is to create the appearance of regularity without its reality and thereby to evade Furman's command. See pp. 19-46, supra.

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-6257

TROY LEON GREGG,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

INDEX

		Page
STATEMENT OF THE CASE		1
REASONS FOR NOT GRANTING THE WRIT		11
I.	Petitioner's fourth amendment claim is governed by well settled principles.	11
II.	Petitioner's Miranda and due process contentions concerning his custodial statements also fail to demonstrate substantial merit	14
III.	The Court should not grant the writ to consider whether the death sentence is cruel and unusual	17
IV.	Petitioner did not make a seasonable presentation of his contention that the Georgia procedure for determining death sentence proportionality denies him due process, equal protection under the law, and the effective assistance of counsel.	20

CASES

Alderman v. United States, 294 U.S. 165 (1969)	13
Chambers v. Maroney, 399 U.S. 42 (1970)	13
Chapman v. California, 386 U.S. 18 (1967)	14
Coley v. State, 231 Ga. 829, 204 S.E. 2d 612 (1973)	20
Draper v. Illinois, 358 U.S. 307 (1959)	13
Eberheart v. Georgia, No. 74-5174 (filed Aug. 19, 1974)	17
Eberheart v. State, 232 Ga. 227, 206 S.E. 2d 12 (1974).	20
Floyd v. State, 233 Ga. 280 __S.E. 2d__ (1974).	2, 19
Frazier v. Cupp, 394 U.S. 731 (1969).	17
Furman v. Georgia, 408 U.S. 238 (1972).	17, 18
Gregg v. State, 233 Ga. 117 __S.E. 2d__ (1974).	1, 19
Gustafson v. Florida, 414 U.S. 260 (1973)	13

I

	Page
Harris v. New York, 401 U.S. 222 (1971)	16
Harris v. United States, 403 U.S. 573 (1971).	12
House v. State, 232 Ga. 140, 205 S.E. 2d 217 (1974) . .	20
Jackson v. Denno, 378 U.S. 368 (1964)	17
Jarrell v. State, No. 29473 (Ga. S.Ct., docketed Nov. 4, 1974)	2
Lego v. Twomey, 404 U.S. 477 (1972)	17
Miller v. United States, 396 F.2d 492 (8th Cir. 1968), cert. denied 393 U.S. 1031 (1969).	16
Miranda v. Arizona, 387 U.S. 436 (1966)	8, 14, 15, 16
Moore v. State, No. 29278 (Ga. S.Ct., Feb. 12, 1975). .	19
Tacon v. Arizona, 410 U.S. 351 (1973)	20
United States v. Manar, 454 F.2d 342 (7th Cir. 1971). .	16
United States v. Osterberg, 423 F.2d 704 (9th Cir. 1969).	16
United States v. Robinson, 414 U.S. 218 (1973).	13
Whiteley v. Warden, 401 U.S. 560 (1971)	12

S T A T U T E S

Ga. Code Ann. §§ 26-3102, 27-2503 (formerly 27-2534.1), -2534, -2537 (Supp. 1974)	18

OTHER AUTHORITY

Note, 87 Harv. L. Rev. 1690 (1974)	18

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STATEMENT OF THE CASE

On February 7, 1974, Petitioner was convicted of the murders and armed robberies of Fred Simmons and Bob Moore in Gwinnett County, Georgia, on November 21, 1973. The Supreme Court of Georgia affirmed the convictions and the two death sentences for murder but remanded for resentencing on the armed robberies. Gregg v. State, 233 Ga. 117, S.E. 2d (1974).[1]

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[1]The Court held that once one capital felony had been used as a statutory aggravating circumstance to justify a death sentence for

Petitioner's jurors did not have to deal with a difficult question of disputed identity. They knew who killed Fred Simmons and Bob Moore because Appellant told them he did. The crucial, factual issue was the question of intent: Why did Petitioner gun down the two men who had given him and his sidekick a ride all the way from Florida to Atlanta?

Appellant swore it was in self-defense. Everything else pointed to murder in cold blood for a second-hand Pontiac with re-tread tires and perhaps $500.00:

The bodies of Fred Simmons and Bob Moore were found Thanksgiving morning in a drainage ditch at the intersection of I-85 and Georgia Highway 20 (the Lawrenceville Highway), just northeast of Atlanta. Simmons was dead of a bullet wound in the temple. Moore had been shot in the back of the head. Dr. Byron Dawson, when he performed the autopsy, specifically looked for signs that either man had been fighting. The evidence tended to discount that possibility, being more consistent with the bodies' having been dragged and dropped into the culvert shortly after their deaths.

Headlines about the apparently brutal murders caught the attention of a horrified visitor to Atlanta, Dennis Weaver. The victims were the same, amiable men who had given him a ride from north Florida the day before Thanksgiving. Weaver went to the police and described the

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another committed with it, the latter offense could not be used to aggravate the former. 233 Ga. at . It also held that death sentences are disproportionate in armed robbery cases. 233 Ga. at . Neither holding is insignificant. A defect peculiar to the murder convictions would eliminate Petitioner's capital sentence -- even without the disproportionality holding. The Court has been asked to reconsider the rejection of reciprocal aggravation in Jarrell v. State, No. 29473 (Ga. S.Ct., docketed Nov. 4, 1974). The Court reaffirmed the conclusion that the death sentence is disproportionate in armed robbery in Floyd v. State, 233 Ga. 280, S.E. 2d (1974).

-2-

car he rode in and its passengers. They were the victims, ["Fred" (Edward Simmons) and "Tex" (Bob Moore)], and two other hitchhikers, ["Troy" (Petitioner, Troy Leon Gregg), and "Sam" (Petitioner's sidekick, Floyd Raiford Allen, III)]. Weaver said he had heard the men say they were going to Asheville, North Carolina.

With the lead given by Weaver, and with help from other clues that a particular maroon and white Pontiac was involved, police were able to broadcast a wanted description for the car and suspects. (Victim Moore had a credit card receipt in his pocket which had his tag number on it and which Florida was able to trace). The lookout (accurately so) was for a maroon bottom, white top Pontiac, having a black spot on the trunk lid, a dent in the rear fender, white wall tires, dual hub caps, and Florida tag 7W 85 381, and occupied by two white males: one about 6'1" or 6'2", slender, long greasy hair, about 135-140 pounds, and the other sixteen to seventeen years old, short hair, nickname Sam, and possibly having a hurt lip. That message led to the arrest of Petitioner and his cohort, Sam, in Asheville, North Carolina, two days after the murder. Petitioner was driving Simmons' car, had a wad of money, the bill of sale for the car, new boots, and a pistol of his own, which was later proved ballistically to have fired the fatal bullet. Simmons was later identified by Weaver in Asheville.

Since then Petitioner has given several versions of the killings. He and Weaver did give similar accounts of the drive up from Florida. They said that Fred and Tex were hired hands en route to Texas, or perhaps Asheville, North Carolina, after working in Florida. They had picked up Troy and Sam near St. Cloud, Florida.

- 3 -

At that time they were driving Simmons' 1969 Ford, but it threw a rod. When a highway patrolman came by, Simmons told him "he (Simmons) would like to buy another car." The patrolman gave Simmons and Moore a lift to a used car lot while Troy and Sam stayed with the Ford. In his testimony, the highway patrolman indicated that Simmons and Moore had

> "a considerable amount of money, cash, tens and twenties and bills of various denominations. They had it out of their wallet rolled up and the tall man (Moore) had most of the money in several pockets and he kept pulling money out of all different pockets."

Simmons purchased another car, and the group drove on to the intersection of I-75 and I-10, where they picked up Weaver. The trip to Atlanta was friendly enough and uneventful, although Weaver later remembered moments of premonition -- for example, a time at a rest stop when Sam and Appellant were outside the car, mysteriously talking and looking his way.

Weaver got out in Atlanta at I-85 and Druid Hills Road, and his account necessarily ends there, on an oddly prophetic warning from "Tex" about the dangers of the highway. But Petitioner's own versions and talk of the events that night continue.

The most recent of these versions is in the testimony Petitioner gave to the jury. In his own words:

> "We were driving, I drove about 30 or 35 minutes and it had been raining a little bit and the road was a little slick and I

was driving slower than I had been, and - ah - Fred and Bob said that they wanted to go to the restroom. So, that's when I stopped on - ah - Georgia 20 and 85.... At that time Fred and Bob were both in the front seat with me and they got out and I got out and Sam was about half asleep in the back seat and he roused up and he got out and we were all standing on the right hand side of the car, and - ah - Fred and Bob were standing at the front and Sam and I were standing about half way the car and Fred and Bob were talking, I don't know what they were saying, I couldn't understand them, there was traffic on Interstate and it was heavy at that time of the night and there was a quite a bit of noise and I couldn't understand what they were saying.... Ah, Fred hit me on the left jaw and knocked me in the drainage ditch and I got back up and asked him to leave me alone and he hit me the second time and knocked me back into the drainage ditch and when I came out of the drainage ditch the second time he came at me. I don't know what he had in his hand, it could have been a knife or pipe, I don't know what it was, but when he came at me the second time I shot him. (He had an object in his hand). It was either a knife or a pipe, about-six or eight inches long, I couldn't see that

clear. . . . Bob was beating up on Sam and I shot him, and - ah - it scared me then so I propped up against the car, cause I couldn't hardly stand up, and I was just standing there kinda nervous and Sam run around in the drainage ditch. . . . He came up out of the drainage ditch, he picked up something out of the drainage ditch and said let's go, he got in the car and sat down and I was scared so I drove the car and left."

Petitioner went on to say that he "was just protecting myself" and that he did not intend to kill his victims.

Petitioner never testified that he was in a quarrel with Simmons or Moore, and in fact he said "I never did learn how to fight, I have always been afraid to fight."

In regard to Petitioner's testimony that Sam was in a struggle with Moore, there was testimony by Ashville police that Sam had a sore lip when apprehended, but he had a sore lip when Weaver saw him, too, before the killing, and told Weaver about a fight he had had in Florida.

On cross-examination, Petitioner was unable to explain his victim's wound in the back of the head in terms of his story of self-defense and defense of Sam. Nor could he explain why a "knife or pipe" was not found at the scene. Petitioner attempted to explain his possession of more than $100.00, at the time of his arrest, when he had originally had only about $10.00, by saying that he accidentally

ran into a taxi cab driver in Asheville, who owed him the money. Petitioner admitted that he had never informed his attorney or his people in Asheville about this circumstance. He attempted to explain all his new paraphernalia by saying that Sam had purchased it.

Finally, Petitioner did not effectively answer how he was knocked twice into a ditch by a man who had been drinking beer all day, according to Weaver and Petitioner's own accounts; who already had preferred to have Petitioner drive instead of himself; who was having trouble keeping his balance; and who was "heavily intoxicated" according to the results of the pathologist's analysis of Moore and Simmons' blood.

While he was awaiting his trial, Petitioner was so concerned that his jury receive an authoritative version of the events that night, that Petitioner prepared a script for Sam to follow in testifying about them. Unfortunately, Sam did not testify, and Appellant's credibility was further impeached when the jury learned about Petitioner's efforts at pre-trial coaching.

Except for his trial testimony, and his prepared script, all the other statements made by Petitioner concerning the crime and introduced at trial were made within about fifteen hours following Petitioner's arrest. Two of these statements were made in Asheville. The third was made at the murder scene, on the trip back to Lawrenceville. Petitioner has made the circumstances surrounding all three statements the subject of his second and third arguments. His statements were all the subject of hearings outside the presence of the jury, and the trial judge found they were voluntary after considering the circumstances and statements as they are described next in this brief.

Petitioner and Sam were arrested about 3:00 p.m. in Asheville, North Carolina, the day after the murder, because they were driving Fred Simmons' Pontiac with its license tag, as described by Weaver, and in the police bulleting, and because they matched the description of suspects said to be wanted in the double murder. Within five minutes of his arrest about 3:00 p.m., Petitioner was given a Miranda warning.

Petitioner also read and signed a standard rights waiver about 3:15 p.m.

Asheville police notified Gwinnett County about the arrest about 4:00 p.m. and Gwinnett officers then obtained murder warrants against Petitioner and drove to Asheville. They first saw him at a magistrate's office, where Petitioner waived extradition about 9:30 or 10:00 that night.

Petitioner had not been questioned at all at that time. After the group came back to the station from the magistrate's office, Gwinnett County Detective B. H. Blannot, asked Petitioner if he would like to talk with Blannot and Gwinnett Police Chief Crunkleton. Petitioner agreed and for about thirty minutes spoke with them, while Detective Blannot wrote down Petitioner's version of the shootings at that time. Before he made the statement, Petitioner was warned again specifically that he was the subject of a Gwinnett County murder warrant.

To a certain extent, this statement, acknowledged and signed by Petitioner, is similar to his trial testimony. However, that night he did not try to put all the blame for taking the money on Sam, but said, "we took about four or five hundred dollars." Also that night, he initially tried to deny knowing Fred Simmons.

After talking with Detective Blannot and Chief Crunkleton, Petitioner went with the other two men out into the lobby or detectives' work room to wait until the interview with Sam was over. While they were waiting, Petitioner asked Asheville Detective William Gibson for a cigarette and during their apparently private conversation, Gibson asked Petitioner "why he shot those people."

Petitioner's response was introduced at trial in rebuttal to his trial testimony that he had not meant to kill Moore and Simmons. To the contrary, what Appellant told Gibson was, "by God, I wanted them dead."

The return trip to Lawrenceville began about 12:30 or 1:00 a.m. It lasted about four hours. Petitioner and Sam were in separate cars. During the trip back, Petitioner was loosely handcuffed except for stops for doughnuts and coffee. He dozed and rested the entire way back, and the group conducted only a general conversation without discussing the crime.

The group returned from Asheville on I-85, and about 5:00 a.m., it arrived at the Lawrenceville Highway exit. Blannot said officers purposely stopped there to reconstruct events, but it was six of one and half a dozen of the other as to whether this exit or an alternate exit was the more direct route home. He personally had always used the Lawrenceville exit anyway. When all got out, Sam, in front of Petitioner, told the group what happened:

> "Sam told us that he had been sitting in the back seat of the 1960 Pontiac and was about half asleep that he woke up when the car stopped. The two victims got out, Fred and Tex, got out, and Sam told us as soon as they got out, Troy turned around and told

him, he said, get out, we're going to rob them. Sam told us that he got out and walked toward the back of the car and looked around and could see Troy at the car, with a gun in his hand, laying up on the car, so he could get a good aim, the two men had gone down the bank and had relieved themselves and as they were coming up the bank, according to Sam, Troy fired three shots, one of the men fell, the other staggered, Troy then circled back around the back, or rear of the car and approached the two men, both of which were now laying in the ditch. He placed the gun to ones head and pulled the trigger then went quickly to the other one and placed the gun to his head and pulled the trigger again, he then took the money, whatever contents were in their pockets, he told Sam, to get in the car and they drove away."

Petitioner did not deny the accuracy of Blannot's report of Sam's words. He did tell his jury that when he heard Sam say this, he dropped his "head and said Sam was doing the talking."

Detective Blannot, who was obviously believed, did not remember Petitioner's response quite that way. In his account, when Sam finished, police "Chief Crunkleton asked Troy, if that was how it happened, and Troy replied after hanging his head and looking at the ground, yes it was. . . :"

"Chief Crunkleton then asked him these words, I quote, you mean you shot these men down in cold-blooded murder just to rob them. . . and Troy replied, yes, and Chief asked him why, and he said didn't know."

REASONS FOR NOT GRANTING THE WRIT

I. PETITIONER'S FOURTH AMENDMENT CLAIM IS GOVERNED BY WELL SETTLED PRINCIPLES. (Question 1).

When Petitioner was arrested, he was searched, and police found the murder weapon and $107 in cash upon him. They searched the car in which he was captured as soon as they arrived at the police station following the arrest and found some old and new clothing, the victim Moore's bill of sale for the car and the business card of the Florida car lot where the victims bought the car. Police also searched the motel room, which Petitioner told police he had used the night before, and found a "stereo tape outfit and...a new stereo player."

An arresting officer from North Carolina testified about each of these discoveries. Physical evidence admitted at trial included the weapon, the bill of sale, and the business card described above. Following Detective McMahon's testimony, Petitioner moved to strike each of the physical exhibits and the testimony. Petitioner's theory then, before the Supreme Court of Georgia, and now has been that each of these items

of evidence are tainted fruit of Petitioner's warrantless arrest in an absence of probable cause. He has embraced this same theory in seeking exclusion of each of his custodial statements to the police.

The Fourth Amendment claim thus made is inappropriate for consideration by writ of certiorari because its disposition by the Supreme Court of Georgia was correct under well settled principles of constitutional law.

The case began with discovery of the bullet-ridden bodies of two men beside an interstate highway near Atlanta, on the route to Asheville, North Carolina. A hitchhiker gave police a description of the car driven by the victims and of two other hitchhikers, who remained with the victims when he himself got out not far from the scene and not long before the deaths occurred. The hitchhiker told police the other four men were discussing plans to go to Asheville. One victim's pocket contained a gas station receipt with a license tag number written upon it. The receipt corroborated the hitchhiker's account of driving from Florida, and the tag number, when forwarded to Florida police, led to a car description, which also corroborated the hitchhiker.

On these facts, a reasonably prudent man would have believed a crime probably had been committed by persons he found matching the hitchhiker's descriptions and driving a car like the one described. Such a belief is probable cause for arrest. See Harris v. United States, 403 U.S. 573, 584 (1971). So long as it has this validity at its source, the lookout bulletin broadcast by Georgia police so that others might act upon it was constitutionally permissible. See Whiteley v. Warden, 401 U.S. 560 (1971). So was the warrantless arrest made by

Asheville police when they found suspects of the right description in a car also of the right description. See Draper v. Illinois, 358 U.S. 307 (1959).

Pursuant to a lawful arrest, police may search a suspect without a warrant for weapons and evidence of the crime. United States v. Robinson, 414 U.S. 218 (1973); Gustafson v. Florida, 414 U.S. 260 (1973). Under the exigent circumstances of the automobile arrest in this case, police with probable cause were authorized to conduct a warrantless search of the vehicle. See Chambers v. Maroney, 399 U.S. 42 (1970). To have even the standing to contest that conclusion, Petitioner would need to omit from the record the proof that the car was stolen from his victims. See Alderman v. United States, 394 U.S. 165 (1969). Thus, the physical evidence and the testimony about its discovery on Petitioner and in the car ought not to be the subject of a review by a discretionary writ of certiorari for they are the legitimate fruits of a lawful arrest, under well settled principles. To the extent that the attack on custodial statements depends upon the same theory of constitutional invalidity in the arrest and subsequent custody, it too should be rejected for the same reason: The arrest and custody were valid.

In regard to the testimony that officers had found the stereo equipment when they searched the motel room, nearly the same argument applies. The contention consistently has been made on the theory that probable cause for the warrantless arrest was absent. The argument clearly is without merit. To the extent that this search was not pursuant to the arrest, however, and was not part of the automobile search, either, nevertheless the Court might assume arguendo there

was a Fourth Amendment defect and still deny certiorari with propriety. Beyond reasonable doubt, see Chapman v. California, 386 U.S. 18 (1967), a jury with the circumstantial evidence in this case, the statements by Petitioner, and in particular his admission that his cohort was telling the truth at the scene, would have reached the same result had it had all the evidence before it again except for the simple statement by an officer that in searching the motel police found "some clothing and a stereo tape outfit and we found a new stereo player that was made for a car."

The writ should be denied insofar as it seeks to present a Fourth Amendment argument for excluding the statements, the murder weapon, and other evidence described above.

II. PETITIONER'S MIRANDA AND DUE PROCESS CONTENTIONS CONCERNING HIS CUSTODIAL STATEMENTS ALSO FAIL TO DEMONSTPATE SUBSTANTIAL MERIT. (Questions 2, 3).

As soon as he was arrested about 3:00 p.m. in Asheville, Petitioner was given a warning pursuant to Miranda v. Arizona, 387 U.S. 436 (1966) and was told that he was under suspicion in Georgia, possibly for murder. He signed a standard rights waiver a few minutes later. About 4:00 p.m. Gwinnett County police were notified and they obtained murder warrants for Petitioner and his companions and drove to Asheville. They first saw Petitioner about 9:30 or 10:00 that night at a magistrate's office where Petitioner waived extradition.

At the police station afterwards, Petitioner voluntarily gave a thirty minute written statement to the Gwinnett County Police Chief and the detective assigned to the case. This statement was exculpatory to the extent that it was predicated on self-defense. Miranda was not specifically reiterated, but Petitioner was told once again he was the subject of a murder warrant, and Detective Blannot asked Petitioner whether he had been advised of his rights (Blannot having been told by North Carolina police that they had advised Petitioner).

Also at the police station, Petitioner, in conversation with the North Carolina officer, whom he asked for a cigarette, after talking with Gwinnett County officers, told him he shot Moore and Simmons because "by God I wanted them dead." This statement was in response to Gibson's question about the reason for the shooting.

Petitioner's young cohort gave a statement to Georgia authorities in Asheville. It implicated Petitioner in cold blooded murder. Petitioner and the cohort began the return trip back to Georgia in separate cars about 12:30 a.m. or 1:00 a.m. The trip back lasted about four hours, and Petitioner was loosely handcuffed, except for stopping for doughnuts and coffee. The case was not discussed until the two cars arrived at the scene of the slaying, which was en route to Lawrenceville, the Gwinnett County seat.

There Sam, the cohort, described what had occurred. At his trial, Petitioner said he only said then that Sam was doing the talking. The jury believed the detective, who said Petitioner acknowledged the truth of Sam's version.

In testifying before the jury, Petitioner himself reiterated in substantial part what he had said in North Carolina. Petitioner disputed the State's version of what occurred at the scene on the

way back, but significantly Petitioner did not testify that he was in fear, coerced, or unaware of his rights, in connection with any of the statements.

In this setting, Petitioner makes two arguments. In Part II, he contends that each of the three statements should have been excluded because they were not immediately preceded by the warning required in Miranda. In Part III, he seeks to have excluded the admission he made at the scene that Sam was telling the truth on the grounds that, considering the circumstances as a whole, the statement was involuntary.

The statement made to Gibson ("by God, I wanted them dead") was introduced in rebuttal for the purpose of impeaching Petitioner's testimony that he did not mean to kill the victims, only to fend them off. Regardless of the disposition of the narrow Miranda question, this statement was admissible. Harris v. New York, 401 U.S. 222 (1971).

In regard to the narrow Miranda question, when a record is sufficient to demonstrate an adequate Miranda warning, and its understanding, several hours prior to custodial statements, this mere lapse in time without a reiteration of the former warning is not itself sufficient to invoke the exclusionary rule. See United States v. Manar, 454 F.2d 342 (7th Cir. 1971); United States v. Osterberg, 423 F.2d 704 (9th Cir. 1969) cert. denied 399 U.S. 914 (1970); Miller v. United States, 396 F.2d 492 (8th Cir. 1968), cert. denied 393 U.S. 1031 (1969).

Even in the presence of Miranda warnings, however, custodial statements must have been voluntary. The trial judge in this case

conducted a hearing pursuant to Jackson v. Denno, 378 U.S. 368 (1964) and he and the jury were satisfied that each of Petitioner's statements were voluntary. The determination of that question is essentially factual, see Lego v. Twomey, 404 U.S. 477 (1972), determined upon the record as a whole. See Frazier v. Cupp, 394 U.S. 731 (1969) (statements triggered by police ruse that accomplice had implicated suspect).

III. THE COURT SHOULD NOT GRANT THE WRIT TO CONSIDER WHETHER THE DEATH SENTENCE IS CRUEL AND UNUSUAL. (Question 4).

Petitioner incorporates by reference the reasons for granting Eighth Amendment review presented in Eberheart v. Georgia, No. 74-5174 (filed August 19, 1974). Respondent also continues to rely upon his brief in opposition in that case and further supplements his opposition to the grant of certiorari in this instance as follows:

Petitioner and Respondent share a common starting ground in taking note of the fact that a number of persons have been found by their contemporaries in this country to merit death as lawful punishment. For Petitioner, this is part of his argument that the Court should reconsider the question before it in Furman v. Georgia, 408 U.S. 238 (1972). However, the very reason proffered for granting review is an in-road into the merits of the claim itself that contemporary community standards render capital punishment cruel and unusual.

In Furman, supra, the Court declined to hold that the death sentence is per se unconstitutional. In light of the reaffirmation of the death penalty by a majority of American jurisdictions, Note, 87 Harv. L. Rev. 1690, 1691 (1974), the Court should decline to reconsider the question.

As an alternative argument, Petitioner would have the Court consider whether the capital procedures implemented in Georgia since Furman result in cruel and unusual punishment because of the arbitrary, rare and discriminatory use which they would make of the death penalty. Petitioner has not demonstrated substantial grounds for having the court consider this question, either.

Respondent respectfully suggests that the holding in Furman may be stated as the following, result-oriented proposition: Isolated defendants cannot be sentenced to die on the basis of chance or arbitrariness or impermissible social attitudes. The statute must be applied in such a way that there is a meaningful pattern of death sentence imposition.

As written and construed, Georgia procedures satisfy this criterion. In a separate hearing after determination of guilt, a Georgia jury cannot impose a death sentence unless it finds beyond reasonable doubt the presence of at least one of ten "statutory aggravating circumstances." Ga. Laws 1973, p. 159, as amended without material change, Ga. Laws 1974, p. 352 [Ga. Code Ann. § 26-3102, 27-2503 (formerly 27-2534.1), -2534, -2537 (Supp. 1974)].

If death is imposed, there is a second level set of guidelines by which Supreme Court of Georgia reviews the sentence. Ga. Code Ann. § 27-2537, supra. These standards have been paraphrased by

the Supreme Court of Georgia as follows:

> "Whether the sentences of death were imposed under the influence of passion, prejudice or any other arbitrary factor; whether the evidence supports the jury's finding of a statutory aggravating circumstance; and whether the sentences of death are excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant...."
> Floyd v. State, 233 Ga. 280, 284, __S.E.2d__ (1974).

Largely then, through its review for disproportionate sentences, the Supreme Court of Georgia has seen to the implementation of the Georgia statute in the required, neutral and meaningful pattern. The Court has construed its

> "duty under the similarity standard to assure that no death sentence is affirmed unless in similar cases throughout the State the death penalty has been imposed generally and not 'wantonly and freakishly imposed'...." Moore v. State, No. 29278 (Ga. S.Ct., Feb. 12, 1975).

Under the disproportionality standard, for all practical purposes, a death sentence for armed robbery will not stand. Petitioner's case is the leading example, Gregg v. State, 233 Ga. 117, __S.E.2d__ (1974). Rape and probably kidnapping will require

particularly pathetic circumstances. Compare Coley v. State, 231 Ga. 829, 204 S.E. 2d 612 (1973) with Eberheart v. State, 232 Ga. 227, 206 S.E. 2d 12 (1974). The classic death sentence will be one for senseless murder, again, as illustrated by Petitioner's case. See also House v. State, 232 Ga. 140, 205 S.E. 2d 217 (1974). In each instance, a person convicted of death will be a member of a group rationally determined, not one whose members are the result of freakish circumstance. The membership will be in a group determined by the Supreme Court of Georgia to be one whose members will be generally found by Petitioner's contemporaries to be deserving of death.

IV. PETITIONER DID NOT MAKE A SEASONABLE PRESENTATION OF HIS CONTENTION THAT THE GEORGIA PROCEDURE FOR DETERMINING DEATH SENTENCE PROPORTIONALITY DENIES HIM DUE PROCESS, EQUAL PROTECTION UNDER THE LAW, AND THE EFFECTIVE ASSISTANCE OF COUNSEL. (Question 5).

Petitioner also incorporated the Eberheart argument that the Georgia death statute procedures for appellate review deprive an indigent of due process, equal protection, and the effective assistance of counsel. Because Petitioner argued before the Supreme Court of Georgia only that the death sentence is cruel and unusual, this presentation has not been preserved for review. Tacon v. Arizona, 410 U.S. 351 (1973).

CONCLUSION

The Court should refuse to grant the writ of certiorari because Petitioner Gregg has not set forth sufficient reasons for review.

Respectfully submitted,

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FILED
MAY 30 1975

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO: 74-6257

TROY LEON GREGG,

Petitioner,

v.

STATE OF GEORGIA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF GEORGIA

MEMORANDUM IN CORRECTION OF
BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

On page 16 of Respondent's Brief in Opposition, the statement is made that "significantly, Petitioner did not testify that he was in fear, coerced, or unaware of his rights, in connection with any of the statements." In writing this sentence, the attorney whose signature appears last on the brief inadvertently overlooked

Petitioner's testimony before the jury, (T. 323-324), that he was afraid when back at the scene and that it was dark and foggy at the time of the return visit.

This 5th day of May, 1975.

Respectfully submitted,

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BRIEF FOR PETITIONER

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
QUESTION PRESENTED	3
STATEMENT OF THE CASE	3
HOW THE CONSTITUTIONAL QUESTION WAS PRESENTED AND DECIDED BELOW	9
SUMMARY OF ARGUMENT	10
ARGUMENT:	
I. THE PERPETUATION OF ARBITRARY SELECTIVITY UNDER THE GEORGIA CAPITAL PUNISHMENT STATUTE	11
A. Pre-Sentence Selective Mechanisms	18
1. Prosecutorial Discretion	18
2. Jury Discretion	20
B. Sentencing Discretion	22
C. Post-Sentence Selective Mechanisms	28
1. Appellate Review	28
D. Executive Clemency	33
II. THE EXCESSIVE CRUELTY OF DEATH	35
CONCLUSION	36
Appendix A: Part III of the Brief for Petitioner, *Jurek v. Texas* (No. 75-5394)	1a

TABLE OF AUTHORITIES

Cases: *Page*

Alford v. Eyman, 408 U.S. 939 (1972) 28
Allen v. State, 231 Ga. 17 (1973) 32
Alvarez v. Nebraska, 408 U.S. 937 (1972) 28, 29
Bennett v. State, 231 Ga. 458 (1973) 32
Billingsley v. New Jersey, 408 U.S. 934 (1972) 28
Caldwell v. Paige, 230 Ga. 456 (1973) 20
Callahan v. State, 229 Ga. 737 (1972) 32
Chambers v. Mississippi, 410 U.S. 284 (1973) 13
Coley v. State, 231 Ga. 829 (1974) 10, 14, 29
Commonwealth v. Edwards, 380 Pa. 52 (1955) 29
Commonwealth v. Hough, 358 Pa. 247 (1948) 29
Commonwealth v. Phelan, 427 Pa. 265 (1967) 29
Davis v. Connecticut, 408 U.S. 786 (1972) 28
Davis v. Wechsler, 263 U.S. 22 (1923) 13
Duling v. Ohio, 408 U.S. 936 (1972) 28
Eberheart v. State, 232 Ga. 140 (1974) 10
Echols v. State, 46 Ga. 668 (1933) 21
Fesmire v. Oklahoma, 408 U.S. 935 (1972) 29
Fesmire v. State, 456 P.2d 573 (1969) 29
Furman v. Georgia, 408 U.S. 238 (1972) . . . . . *passim*
Gregg v. State, 233 Ga. 117 (1974) 27, 32
Hart v. State, 227 Ga. 171 (1971) 32
Henderson v. State, 227 Ga. 68 (1970) 32
Herron v. Tennessee, 408 U.S. 939 (1972) 28
House v. State, 232 Ga. 140 (1974) 10, 32
Howard v. State, 231 Ga. 186 (1973) 32
Hunter v. State, 231 Ga. 494 (1973) 32
Hurst v. Illinois, 408 U.S. 935 (1972) 28

Page

Jackson v. Denno, 387 U.S. 368 (1964) 13
Jackson v. Georgia, 408 U.S. 238 (1972) 11
Johnson v. State, 231 Ga. 138 (1973) 32
Jurek v. Texas (No. 5394) (certiorari granted January 22, 1976) 35
Kramer v. State, 230 Ga. 855 (1973) 32
Lane v. Wilson, 307 U.S. 268 (1939) 13, 34
Lingerfelt v. State, 231 Ga. 354 (1973) 32
McGautha v. California, 402 U.S. 183 (1971) 12, 25
Mempa v. Rhay, 398 U.S. 128 (1967) 13
Morgan v. State, 231 Ga. 280 (1973) 32
Parks v. State, 206 Ga. 675 (1950) 33
Pass v. State, 227 Ga. 730 (1971) 32
People v. Black, 367 Ill. 209 (1937) 28
People v. Hurst, 42 Ill. 2d 217 (1969) 29
People v. Sullivan, 345 Ill. 87 (1933) 28
Phelan v. Brierly, 408 U.S. 939 (1972) 29
Reeves v. State, 22 Ga. App. 628 (1918) 21
Robinson v. California, 370 U.S. 660, 666 (1962) 35
Scott v. State, 230 Ga. 413 (1973) 32
Sims v. State, 203 Ga. 668 (1948) 20
Sirmans v. State, 229 Ga. 743 (1972) 32
Smith v. State, 230 Ga. 876 (1973) 32
State v. Alford, 98 Ariz. 124 (1965) 28
State v. Alvarez, 182 Neb. 358 (1967) 29
State v. Eaton, 249 N.E.2d 897 (1969) 28
State v. Reynolds, 41 N.J. 163 (1963) 28
State v. Tudor, 154 Ohio St. 249 (1950) 28
Sundahl v. State, 154 Neb. 550 (1951) 28

	Page
Thomasen v. Caldwell, 229 Ga. 637 (1972)	19
United States v. Jackson, 390 U.S. 570 (1972)	23
Watson v. State, 229 Ga. 787 (1972)	32
Weems v. United States, 217 U.S. 349, 374 (1910)	35
Whitlock v. State, 230 Ga. 700 (1973)	32
Williams v. State, 204 Ga. 837 (1949)	21
Woodruff v. State, 164 Tenn. 530 (1932)	28
Statutes:	
Ariz. Rev. Stat., § 13-1717	28
Conn. Gen. Stat. Ann., § 53-10	28
Ga. Code Ann., § 24-2908	19
Ga. Code Ann., § 26-702	22
Ga. Code Ann., § 26-703	22
Ga. Code Ann., § 26-705	22
Ga. Code Ann., § 26-901	22
Ga. Code Ann., § 26-902	22
Ga. Code Ann., § 26-903	22
Ga. Code Ann., § 26-904	22
Ga. Code Ann., § 26-906	22
Ga. Code Ann., § 26-1004	21
Ga. Code Ann., § 26-1005	21
Ga. Code Ann., § 26-1303	21
Ga. Code Ann., § 26-1305	24
Ga. Code Ann., § 26-3102	3, 16, 23
Ga. Code Ann., § 27-1801	19
Ga. Code Ann., § 27-2303	16
Ga. Code Ann., § 27-2503	14
Ga. Code Ann., § 27-2534.1	*passim*
Ga. Code Ann., § 27-2537	3, 17, 30, 31

	Page
Ga. Code Ann., § 77-511	33
Georgia Constitution, Art. V., Par. XI	33
Ga. Laws, 1973, pp. 159-172, Act No. 74	3, 12, 14, 23, 25, 26
Ga. Laws, 1974, pp. 355-358, Act No. 854	14
Ill. Rev. Stat., c. 38, § 1-7-(c)(1)	28
Neb. Rev. Stat., § 29-2308	29
N.J. Stat. Ann., § 2A:113-4	28
Tenn. Code Ann., § 39-2406	28

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SUPREME COURT OF GEORGIA

BRIEF FOR PETITIONER

OPINIONS BELOW

The Opinion of the Supreme Court of Georgia affirming Petitioner's conviction of two counts of murder and two counts of armed robbery and affirming the sentence of death for the two counts of murder is reported at 233 Ga. 117 (1974) (A. 2). The oral opinion of the Superior Court of Gwinnett County sentencing Petitioner to die is unreported, and appears at R. 490.

JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. § 1257(3), the Petitioner having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States.

The judgment of the Supreme Court of Georgia was entered on October 17, 1974 (A. 2). The Petition for Certiorari was filed on March 27, 1975, pursuant to an order extending the time for filing the Petition signed by Mr. Justice Powell, Associate Justice of this Court, on February 5, 1975. The Petition for Certiorari was granted on January 22, 1976 (A. 25).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides:

> "Excessive bail shall not be required nor excessive fines, imposed, nor cruel and unusual punishments inflicted."

It also involves the Due Process Clause of the Fourteenth Amendment.

It further involves the following provisions of the Code of Georgia in effect at the relevant times hereto (because of length, the statutory provisions are printed in the Appendix and only the citations are contained in this section):

(A) Ga. Code Ann. § 26-1101 (Ga. Laws 1968, pp. 1249, 1276);
(B) Ga. Code Ann. § 26-1902 (Ga. Laws 1969, p. 810);

(C) Ga. Code Ann. § 26-3102 (Ga. Laws 1973, pp. 159, 170);
(D) Ga. Code Ann. § 27-2302 (Ga. Laws 1963, pp. 122, 123);
(E) Ga. Code Ann. § 27-2514 (Ga. Laws 1973, pp. 159, 171);
(F) Ga. Code Ann. § 27-2534.1 (Ga. Laws 1973, pp. 159, 163);
(G) Ga. Code Ann. § 27-2537 (Ga. Laws 1973, pp. 159, 165);
(H) Georgia Laws 1973, p. 162, Act No. 74;
(I) Georgia Laws 1973, p. 171, Act No. 74.

QUESTION PRESENTED

Whether the imposition and carrying out of the sentences of death for the crime of murder under the law of Georgia violates the Eighth or Fourteenth Amendment to the Constitution of the United States?

STATEMENT OF THE CASE

Certiorari has been granted in this case to review the judgment of the Supreme Court of Georgia entered on October 17, 1974, affirming petitioner's two death sentences for the offenses of murder while setting aside and remanding for resentencing petitioner's two death sentences for the offenses of armed robbery. Petitioner, TROY LEON GREGG, was sentenced to die on February 7, 1974, in the Gwinnett County Superior Court of Georgia, upon convictions for the murder and armed robberies of Fred Edward Simmons and Bob Durwood Moore.

On November 21, 1973, petitioner and a traveling companion by the name of Floyd Ralford ("Sam") Allen were hitchhiking north on the Florida Turnpike when they were picked up by Fred Edward Simmons and Bob Durwood ("Tex") Moore. Subsequently, the automobile in which the four men were traveling broke down. Simmons, the owner of the automobile, then summoned a Florida Highway Patrolman to drive Moore and himself to a local used car dealer, where Simmons purchased a 1960 red and white Pontiac. Simmons and Moore then reunited with petitioner and Allen and resumed their journey northward.

At the intersection of I-10 and I-75 in Florida, another hitchhiker, Dennis Weaver, was picked up. Weaver rode in the automobile until approximately 11:00 P.M., the night of November 21, where he was let out of the car at the intersection of I-85 and North Druid Hills Road in Atlanta. Petitioner drove while Weaver was in the car as both Moore and Simmons were both drinking heavily. Weaver testified at trial that no fighting words were exchanged by any of the men while he was present.

The four men continued traveling in a northerly direction on I-85 to its intersection with Georgia Highway 20 in Gwinnett County, where the car was stopped so as to allow Simmons and Moore the opportunity to urinate. The bodies of Simmons and Moore were found near this intersection the following morning. Each victim's death was determined to have been caused by gunshort wounds, a medical examiner for the State testifying that Simmons had been shot in the right corner of the right eye in the region of the temple (R. 97) and Moore had been shot once in the right cheek of the face and once in the rear of his head. (R. 92).

After reading about the alleged murders in an Atlanta paper on November 23, Weaver contacted the Gwinnett County Police Department, told them about his travels with the victims, gave descriptions of petitioner Allen and the make and color of the automobile, and indicated that he thought the projected destination was Asheville, North Carolina. Based on this information, Gwinnett County Police broadcast a wanted description for the car and suspects over the National Crime Information Center teletype. That message led to the subsequent arrest of petitioner and Allen in Asheville on November 24. At the time of arrest, petitioner was driving a 1960 red and white Pontiac, which car was subsequently determined to be the one that Simmons had previously purchased.

Petitioner was placed under arrest on the ground that he was "wanted for investigation in Gwinnett County, possibly on a murder case." (R. 165). No criminal charges were filed against petitioner at this time. A "shake down" search was then conducted, and a weapon later identified as the murder weapon was recovered, along with approximately $107.00 in cash, from the person of petitioner. A subsequent search of the car produced a bill of sale of the car to Simmons and some old clothes, and a search of the motel room where petitioner was staying turned up a stereo tape outfit and a car stereo player.

When the car was stopped at 3:00 P.M., petitioner was given the Miranda warning, and he thereafter signed a written waiver of his rights at 3:17 P.M. (R. 516). Petitioner was held at the police headquarters in Asheville from this time to approximately 9:30 P.M., at which time he was turned over to the Gwinnett County Police. From the time petitioner was placed under

arrest to the time the Gwinnett Police arrived in Asheville, no interrogation of petitioner took place. (R. 180). At the prompting of Gwinnett County authorities, petitioner made a statement at approximately 11:00 P.M. that was reduced to writing and signed by him. The statement was exculpatory in nature; although petitioner admitted shooting Simmons and Moore, he claimed to have done the shooting in self-defense. (R. 282). In this statement, petitioner further admitted taking four to five hundred dollars from the bodies after the shooting. (R. 283). The Miranda warnings were not repeated to petitioner before he made this statement; in fact, they were never given to petitioner after being initially administered to him upon his arrest.

After making his statement, petitioner then returned to the lobby of the police station where he allegedly made the incriminating statement, "By God, I wanted them dead" in response to a question from Asheville Detective William Gibson as to "why he shot those people." (R. 379). This statement was introduced at trial in rebuttal to petitioner's trial testimony that he had not meant to kill Moore and Simmons.

At approximately 1:00 A.M. the morning of November 25, petitioner was released to the custody of the Gwinnett County Police and was transported by automobile back to Lawrenceville, Georgia. Petitioner was handcuffed during the return trip, which lasted about four hours. (R. 284). In the automobile with petitioner during the return trip were the District Attorney of Gwinnett County, who was in the back seat with petitioner, Detective Blannott and Lt. Morris, both of the Gwinnett County Police Department. (R. 284). Following this car was the 1960 Pontiac, in which Sam Allen rode, along with Police Chief Crunkleton and

Sergeant Mills of the Gwinnett County Police Department, James Burton of the District Attorney's Office of Gwinnett County, and Major Lawler of the Asheville Police Department. (R. 285).

On returning to Georgia, the two cars went to the intersection of Georgia 20 and I-85 and stopped. The time was approximately 5:00 A.M., and the cars were stopped at the scene of the crime for the express purpose of reconstructing events. (R. 290). Everyone got out, and Allen, (who was subsequently allowed to enter a guilty plea to two counts of armed robbery, received concurrent sentences of 10 years imprisonment and 10 years probation and did not testify against petitioner at trial) in the presence of petitioner and in response to a question from Detective Blannott, accused petitioner of shooting the victims without provocation and for the sole purpose of robbing them. Detective Blannott testified as to this statement at trial. (R. 287). At the prompting of Chief Crunkleton, petitioner allegedly made a confession of the crimes at the scene (R. 287), although petitioner subsequently refused to sign a writing that set forth this alleged confession. (R. 288).

Petitioner was tried simultaneously for the murders and armed robberies of Moore and Simmons. Petitioner testified under oath in his own defense, the testimony being similar to his earlier signed statement. (R. 320). At the conclusion of the evidence, the trial court charged the jury that it could find him either guilty or not guilty of the two charges of murder, and of the two charges of armed robbery. The jury found petitioner guilty of all four charges.

A sentencing hearing was then held, at which neither the State nor petitioner introduced any evidence. The

trial court charged the jury that it could decide to recommend a death sentence for murder if it found:

> "One – That the offense of murder was committed while the offender was engaged in the commission of two other capital felonies, to wit, the armed robbery of Fred Edward Simmons and Bob Durwood Moore.
>
> Two – That the offender committed the offense of murder for the purpose of receiving money and the automobile described in the indictment.
>
> Three – The offense of murder was outrageously and wantonly vile, horrible, and inhuman, in that they involved the depravity of the mind of the defendant." (R. 478, 479).

The jury was further instructed that it could decide to recommend a death sentence for armed robbery if it found:

> "That the offense of armed robbery was committed while the offender was engaged in the commission of two capital felonies, to wit, the murders of Fred Edward Simmons and Bob Durwood Moore or that the offender committed the offense of armed robbery for the purpose of receiving money and the automobile set forth in the indictment, or three, that the offense of armed robbery was outrageously and wantonly vile, horrible and inhuman in that they involved the depravity of the mind of the defendant." (R. 479).

The jury recommended death on each of the four counts. The "aggravating circumstances" found by the jury to justify its death verdict for the two counts of murder were:

> "One – offense of murder was committed while the offender was engaged in the commission of two other capital felonies, to wit: the armed robbery of Fred Edward Simmons and Bob Durwood Moore. Two, the offender committed the offense of murder for the purpose of receiving money and the automobile described in . . . . [the two indictments]." (R. 483, 484).

The "aggravating circumstances" found by the jury to justify its death verdict for the two counts of armed robbery were:

> "One – the offense of armed robbery was committed while the offender was engaged in the commission of two capital felonies, to wit: the murders of Fred Edward Simmons and Bob Durwood Moore. Two – the offender committed the offense of armed robbery for the purpose of receiving money and the automobile set forth in . . . [the two indictments]." (R. 484, 485).

The trial court thereupon sentenced petitioner to die.

On October 17, 1974, the Georgia Supreme Court affirmed petitioner's convictions and the two death sentences for the offenses of murder while setting aside and remanding for resentencing petitioner's two death sentences for the offenses of armed robbery. One Justice concurred specially, while one Justice dissented on the ground that the Georgia capital punishment statute was unconstitutional. The Court denied rehearing on October 29, 1974, with one Justice dissenting.

HOW THE CONSTITUTIONAL QUESTION WAS PRESENTED AND DECIDED BELOW

On appeal to the Supreme Court of Georgia, Petitioner's Enumeration of Error Number 3 asserted that:

"The lower Court erred in submitting to the jury the issue of punishment by death in that punishment by death constitutes cruel and inhumane punishment contrary to the provisions of the Eighth and Fourteenth Amendments to the Constitution of the United States."

The Supreme Court of Georgia explicitly rejected this contention and sustained the constitutionality of Petitioner's two death sentences for the crimes of murder, citing its prior decisions in *Coley v. State*, 231 Ga. 829 (1974); *House v. State*, 232 Ga. 140 (1974); and *Eberheart v. State*, 232 Ga. 247 (1974). (A. 11).

SUMMARY OF ARGUMENT

I.

While setting forth certain "standards" governing the imposition of the death penalty for capital crimes, the Georgia capital punishment statute involves and contains a series of uncontrolled discretionary judgments that operate to spare the lives of some defendants while others in similar circumstances are sentenced to die. As administered through such a system, the penalty of death is a cruel and unusual punishment because it has fallen in this case, and will inevitably fall arbitarily upon the isolated defendant, isolated in the sense that he failed to arouse the conscience of one of many participants in the criminal justice process who have explicit or disguised power to save his life.

II.

The punishment of death inflicted in this manner also violates the Eighth Amendment because it is excessive and affronts the principle of human worth embodied in the prohibition of cruel and unusual punishments. No legitimate penal purpose of the State justifies the extreme cruelty of extinguishing human life; and this is in fact the verdict of Twentieth Century American History upon the death penalty. Repudiated in general application, it is tolerated only when imposed upon a random few. But the Eighth Amendment stands to assure that irregular and arbitrary exceptions are not made to the limitations imposed by contemporary standards of decency upon the State's power to punish.

ARGUMENT

I.

THE PERPETUATION OF ARBITRARY SELECTIVITY UNDER THE GEORGIA CAPITAL PUNISHMENT STATUTE.

In *Furman v. Georgia*, 408 U.S. 238 (1972), and its companion cases, this Court ruled that "the imposition and carrying out of the death penalty in these cases constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *Id.* at 239-240. Because *Furman* and one of its companion cases[1] arose from the State of Georgia, the *Furman* decision effectively invalidated the capital punishment laws of Georgia then in existence.

[1] *Jackson v. Georgia* (No. 69-5030).

In response to *Furman*, the Georgia legislature passed, and the Governor of Georgia signed into law on March 28, 1973 a new capital punishment statute for Georgia,[2] and it is under the new statute that Petitioner has been condemned to die. The question presented here is whether the modifications to the capital punishment statute wrought by the Georgia legislature are substantial enough to meet the minimum requirement of *Furman v. Georgia* – that the most extreme penalty known to contemporary man not be imposed arbitrarily.

The arbitrary infliction of death which this Court condemned in *Furman* and companion cases arose from various procedures whereby juries (or judges) were given the option to sentence convicted capital offenders to life (or term) imprisonment or death.[3] Certainly *Furman* and the Eighth Amendment are to be extended beyond the specific procedures invalidated in *Furman* so as to forbid *any* arbitrarily selective imposition of the "unique penalty" of death,[4] whatever the source or mechanism of the arbitrariness. The particular *method* of selecting some men to die while others in like cases live with "no meaningful basis for distinguishing" among them[5] cannot be thought constitutionally decisive. For the Federal Constitution is not ordinarily concerned with the forms of state procedure, but with

[2]Ga. Laws, 1973, pp. 159-172, Act No. 74.

[3]*See McGautha v. California*, 402 U.S. 183, 197-203 (1971).

[4]*Furman v. Georgia, Supra*, 408 U.S. at 310 (concurring opinion of Mr. Justice Stewart).

[5]*Furman v. Georgia, Supra*, 408 U.S. at 313 (concurring opinion of Mr. Justice White).

their result. *See, e.g., Chambers v. Mississippi*, 410 U.S. 284, 302-303 (1973); *Mempa v. Rhay*, 389 U.S. 128, 135-137 (1967); *Jackson v. Denno*, 378 U.S. 368, 391 (n. 19) (1964). It "nullifies sophisticated as well as simple-minded modes" of producing unconstitutional consequences. *Lane v. Wilson*, 307 U.S. 268, 275 (1939). Federal constitutional guarantees cannot – as Justice Holmes wrote in another Context – "be evaded by attempting a distinction" of form without a difference in substance. *Davis v. Wechsler*, 263 U.S. 22, 24 (1923).

The statutory modifications of 1973 represent an attempt by the Georgia legislature to avoid the Constitutional infirmities which beset Georgia's previous capital punishment laws. The approach adopted by the legislature was to attack the most obvious flaw of the prior procedure, that of standardless discretion in sentencing, by providing for a separate sentencing stage in the criminal process and by setting forth in the statute certain "standards" governing the imposition of the death penalty for capital crimes. Yet the sentencing stage is only one of the many stages in the criminal process subject to unrestrained and arbitrary discretion, as will be developed *infra*. To deal only with one stage in the process while ignoring the others does not reduce the arbitrariness and unpredictability in the infliction of the death penalty in any meaningful sense.

In addition to ignoring the problem of standardless discretion and arbitariness in stages other than that of sentencing, the statutory modifications of 1973 contain sentencing standards that are so nebulous and overbroad in scope as to be effectively no standards at all. As will be developed *infra*, these standards amount to nothing more than a codification of the standardless discretion

in sentencing found in the capital punishment laws that were invalidated by this Court in *Furman*. The statutory modification of 1973 notwithstanding, death sentences are still "wantonly and freakishly imposed"[6] in Georgia, the the modifications provide "no meaningful basis for distinguishing the few cases in which . . . [the death penalty] is imposed from the many cases in which it is not." *Id.*, at 313 (Mr. Justice White, concurring).

The new Georgia Law provides a bifurcated trial for the administration of the death penalty for, *inter alia*, murder and armed robbery. *See Coley v. State*, 231 Ga. 829 (1974). After the jury or judge returns a verdict or finding of guilty or after a plea of guilty to one of these crimes, a sentencing hearing is conducted before the jury or judge, and at this hearing, "the jury or judge shall hear additional evidence in extenuation, mitigation and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of such prior convictions and pleas." Ga. Law 1973, p. 162, Act No. 74.[7] The State may present only such evidence in aggravation as it has made known to the defendant.

The judge is to consider or to include in his instructions to the jury "any mitigating circumstances or aggravating circumstances otherwise authorized by law and . . . statutory aggravating circumstances which

[6] *Furman v. Georgia, Supra*, at 310 (Mr. Justice Stewart, concurring).

[7] This section was modified in certain minor respects by Ga. Laws, 1974, p. 355-358, Act No. 854, which also provided that the section would be designated Ga. Code Ann. § 27-2503.

may be supported by the evidence." Ga. Code Ann. § 27-2534.1(b). The "statutory aggravating circumstances" for which the death penalty may be imposed in murder and armed robbery cases are:

> "(1) The offense of murder . . . [or] armed robbery . . . was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who had a substantial history of serious assaultive criminal convictions.
>
> (2) The offense of murder . . . [or] armed robbery . . . was "committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.
>
> (3) The offender by his act of murder [or] armed robbery . . . knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.
>
> (4) The offender, committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.
>
> (5) The murder of a judicial officer, former judicial officer, district attorney, or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.
>
> (6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.
>
> (7) The offense of murder . . . [or armed robbery] . . . was outrageously or wantonly vile, horrible or inhuman in that it involved torture,

depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, or himself or another."

Ibid. What, if any, additional "aggravating circumstances" are "otherwise authorized by law" is obscure. "Mitigating circumstances" are not defined or enumerated at all.

The jury may – but need not – impose a death sentence in all capital cases other than those of homicide when it finds beyond a reasonable doubt a "statutory aggravating circumstance." For to condemn a defendant, it must also make a "recommendation of death."[8] Ga. Code Ann. § 27-2534.1(c). *See* Ga. Code Ann. § 26-3102.

Provision is made for the filing of a standardized form of "report" by the trial judge in capital cases where the death penalty is imposed and for direct automatic appeal to the Georgia Supreme Court.

[8]At the time of petitioner's trial, Ga. Code Ann. § 27-2303 provided:

"In all capital cases, other than those of homicide, when the verdict is guilty, with a recommendation to mercy, it shall be legal and shall mean imprisonment for life."

General guidelines for review are provided,[9] and the Georgia Supreme Court is empowered to affirm the death sentence or to set it aside and remand the case for resentencing. *Ibid.*

Executive discretion to grant or deny clemency in cases where a death sentence has been imposed remains unregulated.

The discrepancy between the regularity and even-handedness constitutionally required in capital sentencing and the unpredictable arbitrariness which results from the modified Georgia procedures can only be appreciated after analysis of the various selective mechanisms which operate before, during, and after sentencing of defendants charged with crimes potentially punishable by death. For the imposition of a death sentence in Georgia remains an extraordinarily rare and fortuitous event not only because judges and juries so often seize the opportunity for mercy offered in sentencing discretion, but also because a death

[9]The Court is directed to consider "the punishment as well as any errors enumerated by way of appeal" in a case where a death sentence has been imposed and to determine:

"(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Code Section 27-2534.1(b), and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

Ga. Code Ann. § 27-2537(c). If the court affirms a death sentence, it "shall include in its decision a reference to those similar cases which it took into consideration." Ga. Code Ann. § 27-2537(e).

sentence signifies that a defendant has missed each of the many opportunities for a lesser disposition.

A. Pre-Sentence Selective Mechanisms

Arbitrary selection operates well before sentencing to spare a substantial portion of Georgia capital defendants, although others similarly situated are ultimately sentenced to death. The principal importance of these pre-sentence selective mechanisms is that they provide an arbitrary sparing for all but a relative handful of defendants originally charged with capital crimes. But this screening out process is also significant because it effectively nullifies a key device upon which the new statute purportedly relies for the control of arbitrary discretion – comparative review in the Georgia Supreme Court – by limiting the base of the comparison to a fraction of the eligible population. See pp. 28-32, *infra*.

1. Prosecutorial Discretion

The impact of the district attorney's discretion on the administration of criminal justice in Georgia is enormous and is unaffected by the new capital punishment statute: "Whom he chooses to prosecute, what he charges them with, whether he charges them at all, whether he later drops the charges or recommends a lower sentence at the time of trial are all within the prosecutor's exercise of discretion."[10] In Georgia, the

[10]Note, *Prosecutorial Discretion*, 21 DE PAUL L. REV. 485, 486 (1971-1972).

decision to prosecute and the choice of charges for which indictment will be sought are left to the district attorney's absolute, unguided discretion. The district attorney's mandate is simply "to prosecute all indictable offenses." Ga. Code Ann. § 24-2908(4). The decision to prosecute petitioner for two capital crimes (murder and armed robbery), in a system where one feature that renders each crime potentially capital is its commission "while the offender was engaged in the commission of another capital felony," Ga. Code Ann. § 27-2534.1(b)(2), is a striking example of the extent to which arbitrary prosecutorial decisionmaking may, quite literally, mean the difference between life and death.

The district attorney also has great discretion to enter a judgment of *nolle prosequi*. He must obtain the consent of the court,[11] but the standards for granting or denying such consent are nowhere specified. Ga. Code Ann. § 27-1801.

Furthermore, the district attorney's discretion to plea bargain – a process by which an estimated ninety per cent of all criminal cases are resolved[12] – is utterly unfettered by the new capital punishment statute, or by any other significant restriction.[13] The fact that capital cases are likely to take up a great deal of time in preparation and trial makes them particularly likely to be settled by plea bargaining.[14] The peculiar harshness

[11]Once the case has been submitted to the jury, the district attorney must also obtain the consent of the defendant to enter a *nolle prosequi*. Ga. Code Ann. § 27-1801.

[12]PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967).

[13]See *Thomason v. Caldwell*, 229 Ga. 637, 194 S.E.2d 112 (1972).

[14]Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 55 (1966).

of a death sentence creates a relatively great risk that a conviction will be reversed on appeal for procedural error and increases the pressure to settle a capital case by a negotiated guilty plea:

> "Since time immemorial [prosecutors] will prefer to get a definite conviction, without the tremendous expense that goes with a . . . [capital] trial, the taking of a chance that a jury may not convict, or that some technical error will be made in the heat of trial which will result in a reversal by an appellate court."[15]

See *Caldwell v. Paige*, 230 Ga. 456, 197 S.E.2d 692 (1973) (plea bargain made after death sentence reversed).

2. Jury Discretion

Although the new Georgia capital punishment statute expressly confers sentencing discretion upon the trial jury following conviction, see pp. 23-27, *infra*, that is not the first or only means available to the jury to spare the defendant's life in cases where, if otherwise disposed, it might choose to sentence him to die. At the first stage of Georgia's bifurcated trial, the jury may convict him of a lesser offense, or it may recognize some amorphous and subjectively defined defense and acquit him altogether.

A Georgia trial judge must charge lesser included offenses when they are established under any view of the evidence, *Sims v. State*, 203 Ga. 668, 47 S.E.2d 862 (1948) and may give such a charge "where, from

[15]Bedau, *Death Sentences in New Jersey*, 19 RUTGERS L. REV. 1, 30 (1963).

the evidence or from the defendant's statement at the trial, there is *anything deducible* which would *tend* to show that he was guilty of [the lesser offense] . . . or which would be sufficient to raise a *doubt* as to which of these grades [of the offense] . . . was committed." *Echols v. State*, 46 Ga. 668, 168 S.E. 790 (1933) (emphasis in original), citing *Reeves v. State*, 22 Ga. App. 628, 97 S.E. 115 (1918). Moreover, a charge regarding a lesser offense is essentially immune from appellate scrutiny even though it is entirely inconsistent with the evidence presented at trial, *Williams v. State*, 204 Ga. 837, 51 S.E.2d 825, 830 (1949).

The jury may convict of criminal attempt even though the crime was consummated, Ga. Code Ann. § 26-1004, and despite the prosecutor's failure to charge the crime of attempt, Ga. Code Ann. § 26-1005. It may convict of an assault with intent to commit a crime even though the crime was consummated, Ga. Code Ann. § 26-1303.

The jury is thus given considerable unreviewable discretion – contingent, of course, upon the exercise of discretion by the trial court in the choice of crimes on which the jury will be instructed[16] – to convict a capital defendant of a lesser offense, not only in cases where the distinctions between crimes or degrees of offense are blurred, but also in cases where conviction of the lesser offense would be wholly inconsistent with the facts proved.

A jury may also be instructed to acquit on the basis of necessarily speculative and imprecise determinations regarding the state of the defendant's mind at the time of the crime. Acquittal is authorized when, at the time

[16]See note 22, *infra*.

of the alleged crime, the defendant "lacked the mental capacity to distinguish between right and wrong", Ga. Code Ann. § 26-702, suffered "a delusional compulsion . . . which overmastered his will," Code Ann. § 26-703, or was acting on the basis of "a misapprehension of fact, which if true, would have justified the act," Ga. Code Ann. § 26-705. Acquittal may also be based upon prescribed justifications, the determination of which involves not only findings as to the defendant's state of mind at the time of the crime, but also judgments as to the reasonableness of the defendant's conduct. Such judgments will inevitably vary with the mores of the deciders. Justification is a defense defined in vague, subjective terms in a variety of enumerated situations (Ga. Code Ann. §§ 26-901(a)-(e), 902-904, 906) and is also allowed "*/i/n all instances which stand upon the same footing of reason and justice as those enumerated . . . .*" Ga. Code Ann. § 26-902(f) (emphasis added). The fluid nature of these concepts, which are "notoriously refractory to the best-instructed human understanding,"[17] as Justice Cardozo recognized long ago when analyzing the distinction between first and second degree murder, affords the jury an indirect "dispensing power" of mercy vouchsafed them "in a mystifying cloud of words."[18]

B. Sentencing Discretion

Once a Georgia defendant has been convicted of a capital crime, the sentencer has absolute discretion to

[17]Black, *Crisis in Capital Punishment*, 31 MD. L. REV. 289, 299, (1971).

[18]CARDOZO, LAW AND LITERATURE (1931) 99.

impose a sentence of life imprisonment, since the procedure of finding "aggravating" and "mitigating" circumstances at the second stage of a bifurcated proceeding does not – and was not intended to – confine the unfettered power of the sentencer to spare the life of a sympathetic capital defendant.[19] See *Furman v. Georgia*, 408 U.S. 238, 401 (1972) (Mr. Chief Justice Burger, dissenting). The finding of a statutory "aggravating circumstance" and no "mitigating circumstances" does not compel a sentencing jury to impose a death sentence, because the statute also requires the jury to make a "recommendation of death," Ga. Code Ann. §§ 26-3102, 27-2534.1(c).[20]

[19]See C. Brewster, *The Georgia Death Penalty Statute – Is It Constitutional, Even After Revision?* 3 GA. J. CORR. 14, 18 (Winter, 1974).

[20]The intent of the statute to confer this discretion on the sentencing jury is made explicit by examination of Ga. Laws 1973, p. 171, Act No. 74, which prohibits a trial judge from imposing a death sentence in a murder or armed robbery case after defendnat has pleaded guilty unless the trial judge finds one of the "statutory aggravating circumstances," but which also provides that the "judge . . . may, *in his discretion*, . . . sentence such person to life imprisonment, or to any lesser punishment authorized by law for the offense named in the indictment." *Ibid.* (emphasis added). Thus, although the trial judge may not sentence to death a defendant who pleads guilty without finding a "statutory aggravating circumstance," he still has complete unfettered discretion *not* to impose the death penalty. Plainly, the legislature intended the sentencing jury to exercise a similar discretion, for the procedure would otherwise be in violation of *United States v. Jackson*, 390 U.S. 570 (1968). See Comment, *Constitutional Law-Capital Punishment-Furman v. Georgia and Georgia's Statutory Response*, 24 MERCER L. REV. 891, 931 (1973).

The particular "aggravating circumstances" specified in the statute are extremely vague, all-encompassing, and open to different interpretations in like cases, depending upon the subjective judgment of the sentencer. Terms like "substantial history of serious assaultive criminal convictions," Ga. Code Ann. § 27-2534.1(b)(1), creation of a "great risk of death to more than one person," Ga. Code Ann. § 27-2534.1(b)(3), and use of a "weapon or device which would normally be hazardous to the lives of more than one person" *id.*, are extremely imprecise and leave great freedom to the trial judge or jury to define their content. In addition to the great vagueness of these phrases, their coverage is extraordinarily broad. To allow the sentencer to impose a death penalty if the crime of murder or armed robbery is "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim," Ga. Code Ann. § 27-2534.1(b)(7), is potentially to authorize capital punishment for *any* murder or armed robbery.[21] Furthermore, the list of statutory "aggravating circumstances" is not exclusive or exhaustive, so that even if the foregoing "aggravating

[21]The finding of an "aggravated battery" is a "statutory aggravating circumstance" which justifies a jury's death verdict for the crime of murder. Ga. Code Ann. § 26-1305 defines "Aggravated Battery" as follows:

> "A person commits aggravated battery when he maliciously causes bodily harm to another by depriving him of a member of his body, or by rendering a member of his body useless, or by seriously disfiguring his body or a member thereof."

It appears, therefore, that a jury would be justified in returning a death verdict in *any* murder case, on the basis of the existence of this "statutory aggravating circumstance."

circumstances" did somehow curb the sentencer's discretion, the sentencer is still free to consider any "aggravating circumstances otherwise authorized by law." Ga. Code Ann. § 27-2534.1(b). Exactly what this phrase means is obscure but it is clear that there is very little limitation on the nature or scope of evidence in aggravation which may be heard or considered.[22] While the statute sets forth certain factors in aggravation for the jury to consider, it nowhere directs that the jury may not consider other factors in aggravation. The statute does "no more than suggest some subjects for the jury to consider during its deliberations." *McGautha v. California*, 402 U.S. 183, 207 (1971).

The statute does not define "mitigating circumstances," and the sentencer is therefore free in any case to consider *anything* a mitigating factor which should

[22]The ambiguous provisions of the statute which empower the trial judge to instruct upon aggravating and mitigating circumstances magnify the effect of the vagueness of the statutory circumstances themselves in jury trials. The trial judge "shall include" in his instructions "*any* mitigating circumstances or aggravating circumstances otherwise *authorized* by law and any of the following statutory aggravating circumstances *which may be supported by the evidence.*" Ga. Code Ann. § 27-2534.1(b) (emphasis added). Again, the trial judge is to give such "statutory instructions" as he determines "to be *warranted* by the evidence" in writing to the jury. Ga. Laws, 1973, p. 165, Act No. 74 (emphasis added). It is not certain whether "supported by the evidence" is equivalent to be "warranted by the evidence" and, if it is, it is unclear what the standard is. The trial judge thus has an enormous discretion to present to the jury reasons to impose or not impose the death sentence in the case before it.

justify mercy.[23] There is thus *no case at all* in which the sentencer might not conclude that some factual element was present which entitled the defendant to a lesser sentence than death.

The deficiencies of the statute, and particularly the imprecision, lack of objective guidelines and arbitrariness in the sentencing state engendered by the specified "statutory aggravating circumstances" are glaringly illustrated in petitioner's case. After petitioner was convicted on two counts of murder and two counts of armed robbery, a sentencing hearing was held and the trial court charged the jury on the possible "aggravating circumstances" it might consider, (See pp. 7-9, *infra.*) The jury recommended death on all four counts, conveniently using the armed robbery counts in aggravation of the murder counts and the murder counts in aggravation of the armed robbery counts pursuant to the circumstance that the capital offenses were committed "while the offender was engaged in the commission of another capital felony" specified in Ga.

[23]There is no limitation, see Ga. Laws, 1973, p. 162, Act No. 74, upon the arguments which can be made by the defendant and prosecutor on the issue of punishment:

> "If the purpose of this Act is to strictly limit discretion in capital cases, one wonders what must be the purpose of such a wide-open allowance of evidence and arguments in mitigation and aggravation. . . . If the state desires to comport with [*Furman*] . . . which indicated that . . . discretion might be greatly restricted by limiting considerations to *specific, objective,* statutorily-prescribed guidelines, why, then, should the *hearing* of arguments and evidence in mitigation and aggravation remain unrestricted?"

Comment, *Constitutional Law-Capital Punishment-Furman v. Georgia and Georgia's Statutory Response,* 24 MERCER L. REV. 891, 932 (1973) (emphasis in original).

Code Ann. § 27-2534.1(b)(2). In further aggravation of the armed robbery counts, the jury was instructed by the trial court that it could find that the robberies were "outrageously or wantonly vile, horrible and inhuman in that they involved the depravity of the mind of the defendant" in accordance with Ga. Code Ann. § 27-2534.1(b)(7).[24] How the armed robberies could possibly have involved the "depravity of the mind" of the petitioner is nowhere stated, nor does the statute require that it be stated. Instead all that is required of the jury in its finding of "aggravating circumstances" is the affixation of certain conclusory labels to the defendant's conduct and the incantation of certain magical phrases in the words of the statute.

In short, under the sentencing provisions of the new Georgia capital punishment statute, any case becomes a possible one for the death penalty or for life imprisonment, and total discretion is left to jurors and trial judges to determine whether any particular defendant shall be put to death. This statute is one in which "the legislature does not itself mandate the penalty in any particular class or kind of case (that is, legislative will is not frustrated if the penalty is never imposed), but delegates to judges and juries the decision as to those cases, if any, in which the penalty will be

[24]The Supreme Court of Georgia set aside and remanded for resentencing petitioner's two death sentences for the offenses of armed robbery, holding that the sentences of death were excessive or disproportionate to the penalties imposed in similar cases, and further holding that the murders could not properly be used in aggravation of the armed robberies where the armed robberies were used in aggravation of the murders. *Gregg v. State,* 233 Ga. 117, 127 (1974) (A. 12).

utilized." *Furman v. Georgia*, 408 U.S. 238, 310-311 (1972) (Mr. Justice White, concurring).[25]

C. Post-Sentence Selective Mechanisms

1. Appellate Review

Although this Court, concurrently with *Furman v. Georgia*, and on its authority, reversed death sentences which had been reviewed by state appellate courts and affirmed on the express ground that the facts and circumstances warranted the extreme penalty,[26] the Georgia legislature has apparently chosen to rely upon a similar review procedure as a response to *Furman*.

[25] At the time of *Furman v. Georgia*, several states had limitations on the jury's discretion to make the life-death choice and standards for the appropriate exercise of that discretion. Death sentences from these states were nevertheless uniformly held unconstitutional. *Davis v. Connecticut*, 408 U.S. 935 (1972) (see Conn. Gen. Stat. Ann., § 53-10); *Moore v. Illinois*, 408 U.S. 786 (1972) (see *People v. Black*, 367 Ill. 209, 10 N.E. 2d 801, 804 (1937); *People v. Sullivan*, 345 Ill. 87, 177 N.E. 733 (1933); Ill. Rev. Stat., c. 38, § 1-7-(c)(1)); *Alvarez v. Nebraska*, 408 U.S. 937 (1972) (see *Sundahl v. State*, 154 Neb. 550, 48 N.W. 2d 689, 704 (1951); *Billingsley v. New Jersey*, 408 U.S. 934 (1972) (see N.J. Stat. Ann., § 2A:113-4 (1969); *State v. Reynolds*, 41 N.J. 163, 195 A.2d 449 (1963)); *Duling v. Ohio*, 408 U.S. 936 (1972) (see *State v. Tudor*, 154 Ohio St. 249, 95 N.E. 2d 385, 390 (1950); *State v. Eaton*, 19 Ohio St. 145, 249 N.E. 2d 897 (1969)); *Herron v. Tennessee*, 408 U.S. 939 (1972) (see Tenn. Code Ann., § 39-2406 (1955); *Woodruff v. State*, 164 Tenn. 530, 51 S.W. 2d 843, 847 (1932)).

[26] *See e.g. Alford v. Eyman*, 408 U.S. 939 (1972) (see *State v. Alford*, 98 Ariz. 124, 402 P.2d 551, 557 (1965); Ariz. Rev. Stat., § 13-1717); *Hurst v. Illinois*, 408 U.S. 935 (1972) (see

(continued)

> "[T]he new statute provides for automatic and swift appellate review to insure that the death penalty will not be carried out unless the evidence supports the finding of one of the serious crimes specified in the statute. The statute also requires comparative sentencing so that if the death penalty is only rarely imposed for an act or it is substantially out of line with sentences imposed for other acts it will be set aside as excessive. And, finally, the statute requires this court to make certain the record does not indicate that arbitrariness or discrimination was used in the imposition of the death sentence."

Coley v. State, 231 Ga. 829, 834 (1974). This review process whereby the Supreme Court of Georgia is asked to determine "[w]hether the sentence of death was

(footnote continued from preceding page)

People v. Hurst, 42 Ill. 2d 217, 247 N.E. 2d 614 (1969)); *Alvarez v. Nebraska*, 408 U.S. 937 (1972) (See *State v. Alvarez*, 182 Neb. 358, 154 N.W.2d 746, 748 (1967); Neb. Rev. Stat., § 29-2308); *Fesmire v. Oklahoma*, 408 U.S. 935 (1972) (see *Fesmire v. State*, 456 P. 2d 573, 586-587 (Okla. Ct. Cr. App. 1969)); *Phelan v. Brierly*, 408 U.S. 939 (1972) (see *Commonwealth v. Phelan*, 427 Pa. 265, 234 A.2d 540 (1967); *cf. Commonwealth v. Hough*, 358 Pa. 247, 56 A.2d 84, 85-86 (1948) *with Commonwealth v. Edwards*, 380 Pa. 52, 110 A.2d 216, 217 (1955)).

The Court reversed death sentences from these states even though these same state appellate courts had a regular and recent practice of reversing death sentences when such sentences were found to be unwarranted upon a consideration of aggravating and mitigating circumstances.

See e.g. State v. Maloney, 105 Ariz. 348, 464 P.2d 793 (1970); *People v. Crews*, 42 Ill. 2d 60, 244 N.E.2d 593 (1969); *State v. Hall*, 176 Neb. 295, 125 N.W.2d 918 (1964); *Lewis v. State*, 451 P.2d 399 (Okla. Ct. Crim. App. 1969); *Commonwealth v. Green*, 396 Pa. 137, 151 A.2d 241 (1959).

imposed under the influence of passion, prejudice, or any other arbitrary factor," "[w]hether . . . the evidence supports the . . . finding of a statutory aggravating circumstance," and "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar . . . cases, considering . . . both the crime and the defendant, "Ga. Code Ann. § 27-2537(c), in fact exacerbates the arbitrariness of capital sentencing.

First, the vagueness and breadth of the statutory "aggravating circumstances" means that the death penalty can be imposed in virtually any capital case, while the fact that "mitigating circumstances" are undefined means that the jury can find a reason to afford mercy to any capital defendant. Given this enormous statutorily-authorized sentencing discretion, it is difficult to see how the Georgia Supreme Court can determine whether "any . . . arbitrary factor" influenced the sentencing deliberations.

Second, the Georgia Supreme Court's reliance on cases that are appealed[27] as a standard for determining whether a "sentence of death is excessive or disproportionate to the penalty imposed in similar cases,

[27]The new Georgia statute requires a trial judge's report only in cases where a death sentence is actually imposed. Ga. Code Ann. § 27-2537(a). The statute also directs the Georgia Supreme Court to "accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate," Ga. Code Ann. § 27-2537(f). Preparation of a formal appellate "record" occurs, of course, only in those cases which are appealed, and it is purely fortuitous whether defendants sentenced to life in cases factually like those of any particular condemned defendant will choose to appeal.

considering both the crime and the defendant," Ga. Code Ann. § 27-2537(c)(3), will provide no reliable guide to whether the death penalty is being uniformly imposed under similar factual circumstances. A comparative sample consisting only of cases appealed to the Georgia Supreme Court is drastically skewed in two ways. Otherwise eligible cases are ignored which involve similar factual circumstances but which were disposed of by various selective mechanisms described above. No account is taken of those capital crime convictions where a life sentence is imposed and no appeal is taken. The myopia inherent in this scheme will prevent ascertainment of the penalties normally imposed in particular circumstances.[28]

Third, the appellate review provisions of the new statute explicitly authorize comparison of death sentences with sentences in pre-*Furman v. Georgia* cases tried under procedures which this Court has already condemned because they lent themselves to arbitrary and discriminatory application. The Georgia Supreme Court is directed to consider "capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate." Ga. Code Ann. § 27-2537(f), and all but one of the cases listed in the "similar cases considered by the court" Appendix attached to the opinion of the Supreme Court of Georgia in petitioner's case were decided under statutes whose death penalty procedures

[28]See C. Brewster, *The Georgia Death Penalty Statute - Is It Constitutional, Even After Revision?* 3 GA. J. CORR. 14, 19 (Winter, 1974) for hypothetical examples of the inequities produced by this form of appellate review.

were invalidated by *Furman v. Georgia.*[29] The result, of course, is a perpetuation of the Eighth Amendment arbitrariness condemned by this Court on June 29, 1972. For post-*Furman v. Georgia*, death sentences are affirmed or reversed on the basis of their conformity with a "standard" consisting of cases in which the death penalty was "wantonly and . . . freakishly imposed," *Furman v. Georgia, supra*, at 310 (Mr. Justice Stewart concurring), at a time when "there [was] . . . no meaningful basis for distinguishing the few cases in which it [was] . . . imposed from the many cases in which it [was] . . . not," *id.* at 313 (Mr. Justice White concurring) and when "the discretion of judges and juries in imposing the death penalty enable[d] the penalty to be selectively applied, feeding prejudices against the accused if he [were] . . . poor and despised,

[29] See *Gregg v. State*, 233 Ga. 117, at 128 (A. 13). The Appendix in *Gregg* listed the following similar cases:

Henderson v. State, 227 Ga. 68 (179SE2d 76); *Hart v. State*, 227 Ga. 171 (179 SE2d 346); *Pass v. State*, 227 Ga. 730 (182 SE2d 779); *Watson v. State*, 229 Ga. 787 (194 SE2d 407); *Callahan v. State*, 229 Ga. 737 (194 SE2d 431); *Sirmans v. State*, 229 Ga. 743 (194 SE2d 476); *Scott v. State*, 230 Ga. 413 (197 SE2d 338); *Whitlock v. State*, 230 Ga. 700 (198 SE 2d 865); *Kramer v. State*, 230 Ga. 855 (199 SE2d 805); *Bennett v. State*, 231 Ga. 458 (202 SE2d 99); *Howard v. State*, 231 Ga. 186 (200 SE2d 755); *Hunter v. State*, 231 Ga. 494 (202 SE2d 441); *Morgan v. State*, 231 Ga. 280 (201 SE2d 468); *House v. State*, 232 Ga. 140 (205 SE2d 217); *Allen v. State*, 231 Ga. 17 (200 SE2d 106); *Smith v. State* 230 Ga. 876 (199 SE2d 793); *Johnson v. State*, 231 Ga. 138 (200 SE2d 734); *Lingerfelt v. State*, 231 Ga. 354 (201 SE2d 445).

House v. State, 232 Ga. 140, is the only case cited which was not decided under statutes whose death penalty procedures were held invalid in *Furman* – because they lent themselves to arbitrary and discriminatory imposition of the death sentence.

lacking political clout, or if he [were] . . . a member of a suspect or unpopular minority." *Id.* at 255 (Mr. Justice Douglas, concurring).

Finally, the Georgia Supreme Court's failure to provide reasoned opinions in support of its sentence review decisions makes it impossible to determine whether this procedure is fulfilling its ostensible purpose. In petitioner's case, the Court provided a list of cases it had "considered", but it did not articulate any principles which would rationalize the cases, indicate what elements of the case under review mandated (or did not mandate) a death sentence. describe the factual circumstances in cases where the appellate report does not disclose them, or explain why certain other cases were not considered.

D. Executive Clemency

The capital defendant who fails to escape the death penalty during the charging, plea bargaining, guilt determination, and sentencing processes is subjected to a final lottery in which the Executive Department (the three members of the Board of Pardons and Paroles acting with the consent of the Governor) has absolute discretion to spare his life or permit his execution. Georgia Constitution, Art. V, § 2-3011, par. XI, Ga. Code Ann. § 77-511. There are no standards whatsoever for the exercise of the commutation power, and the state courts have "no jurisdiction" to review the grant or denial of a commutation in a death case. *Parks v. State*, 206 Ga. 675, 58 S.E.2d 142, 145 (1950). In the eighteen years between 1946 and 1963, 41 of 187 condemned prisoners (22%) were spared by executive

clemency.[30] In view of the precipitous decrease in the number of executions over the past few decades, it appears reasonable to assume that under the new Georgia death penalty statutes, a significant number of those defendants condemned to die will be spared through the exercise of the freakish mercy of executive clemency.

The preceding view of the post-*Furman v. Georgia*, modifications in Georgia's capital procedures reveals that discretionary opportunity for imposition or avoidance of the penalty are, in fact, as numerous and as unregulated as in the pre-June 29, 1972 period. The arbitrariness present in all stages of the procedural system thus insures "that there is no meaningful basis for distinguishing the few cases in which . . . [the death penalty] is imposed from the many cases in which it is not."[31] After *Furman*, Georgia "was confronted with the serious task of devising a new . . . system consonant with her own political ideas but also consistent with the Federal Constitution."[32] It is submitted that Georgia's modified capital punishment procedures are no more consistent with the Eighth and Fourteenth Amendments to the United States Constitution than were the capital punishment procedures invalidated in *Furman*, and the Georga legislative's attempt to evade the meaning of *Furman* should be recognized as nothing more than the exaltation of form over substance and should be brought to an immediate halt by this Court.

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[30]Note, *Executive Clemency in Capital Cases*, 39 N.Y.U.L. REV. 136, 192 (1964).

[31]*Furman v. Georgia, supra*, 408 U.S. at 313 (Mr. Justice White, concurring).

[32]*Lane v. Wilson*, 307 U.S. 268, 275 (1938).

II.

THE EXCESSIVE CRUELTY OF DEATH

Eighth Amendment standards are not static, and the prohibition against cruel and unusual punishment is not "confine[d] to such penalties and punishments as were inflicted by the Stuarts." *Weems v. United States*, 217 U.S. 349, 372 (1910). Instead, the clause prohibiting cruel and unusual punishment is "progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice," *Id.* at 378, and informed by "the light of contemporary human knowledge." *Robinson v. California*, 370 U.S. 660, 666 (1962).

Part I of this brief demonstrated that the imposition of the death penalty remains arbitrary, random and occasional under Georgia's modified capital punishment procedure because that procedure involves a series of uncontrolled discretionary judgments that operate to spare the lives of some defendants while other in similar circumstances are sentenced to die. Part II of this brief will now attempt to demonstrate that the punishment of death is on its face violative of the Eighth Amendment because it is excessive and affronts the principle of human worth embodies in the prohibition of cruel and unusual punishments as defined in the light of contemporary human knowledge.

To avoid burdening this Court with repetitive matter, petitioner adopts and incorporates the argument set forth in Part III of the Brief for Petitioner, *Jurek v. Texas*, (No. 75-5394) (certiorari granted January 22, 1976) at pp. (attached hereto as Appendix A).

CONCLUSION

Petitioner's death sentence is a cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. The judgment of the Supreme Court of Georgia should therefore be reversed.

Respectfully submitted,

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APPENDIX A

Pp. , Brief for Petitioner, Part III, *Jurek v. Texas* (No. 75-5394) (Certiorari granted January 22, 1976).

III. THE EXCESSIVE CRUELTY OF DEATH

Additional grounds compel the conclusion that the penalty of death is an unconstitutionally cruel and unusual punishment in this last quarter of the Twentieth Century. We have set forth those grounds in Part III of Petitioner's *Fowler* Brief, at pp. 102-140,[1] and we adopt them here.[2] Our submission, summarily, is (1) that the unique characteristics of the death penalty demand a particularly exacting standard of judicial review under the Eighth and Fourteenth Amendments (Petitioner's *Fowler* Brief, at pp.

[1] Part III of Petitioner's *Fowler* Brief is further documented by Appendices D and E to the same brief. *See also* Reply Brief for Petitioner in *Fowler v. North Carolina*, No. 73-7031, at pp. 2-7, 15-19, and Appendices B, C, and E thereto. Because the latter brief was not printed and was distributed to the Court on pages of an awkward size, we reproduce it (together with its appendices) as Appendix 2 to the present brief. It is hereafter cited as Petitioner's *Fowler* Reply Brief, and page references are made to the version contained in Appendix 2.

[2] As elsewhere in this present brief, we incorporate Petitioner's *Fowler* Brief by reference in order to spare the court the burden of substantially repetitious reading. As counsel for petitioner Jerry Lane Jurek, however, we are necessarily concerned lest even the most efficient of shorthand devices deprive him of the Court's full consideration of arguments on which his life may depend. We must therefore implore the Court to consider the original text of Petitioner's *Fowler* Brief once again here. Our present one-sentence summary of forty pages of that brief is not intended as a substitute for the original.

103-121);[3] (2) that, when tested under this standard, the obvious cruelty[4] of the extreme penalty[5] cannot be found to be "justified by the social ends it was [legislatively] deemed to serve"[6] (Petitioner's *Fowler* Brief, at pp. 121-130);[7] and (3) that, while a judgment condemning capital punishment as excessively cruel[8]

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[3] *See also Commonwealth v. O'Neal,* ____ Mass. ____, 339 N.E.2d 676, 678-681 (1975) (opinion of Chief Justice Tauro); 339 N.E.2d at 694 (opinion of Mr. Justice Wilkins). In *O'Neal,* a majority of the Supreme Judicial Court of Massachusetts held that the death penalty for rape-murder was a "cruel or unusual punishment" forbidden by Article 26 of the Massachusetts Declaration of Rights.

[4] *Furman v. Georgia, supra,* 408 U.S. at 314 (concurring opinion of Mr. Justice White). *See* Petitioner's *Fowler* Brief, at pp. 109-114.

[5] Like other euphemisms designed to draw a veil of "decent reticence" across the reality of killing human beings (*see* KOESTLER & ROLPH, HANGED BY THE NECK 11-12 (1961)), this phrase from the vernacular inevitably betrays the point that "[c]apital punishment, involving as it does the taking of life, is qualitatively different from other punishments." *Commonwealth v. O'Neal,* ____ Mass. ____, 339 N.E.2d 676, 680 (1975) (opinion of Chief Justice Tauro). *See* note 30 *infra.*

[6] *Furman v. Georgia, supra,* 408 U.S. at 314 (concurring opinion of Mr. Justice White).

[7] The inadequacy of incapacitative, deterrent and retributive justifications to support the death penalty is further discussed in Petitioner's *Fowler* Reply Brief, at pp. 17-19 and Appendices C and E; and the discussion is updated by references to recently published materials in Appendix 3 to the present brief, *infra. See also Commonwealth v. O'Neal,* ____ Mass. ____, 339 N.E.2d 676, 681-688 (1975) (opinion of Chief Justice Tauro).

[8] An historical study published since the filing of Petitioner's *Fowler* Brief documents the concern of the Eighth Amendment's Framers against excessive punishments Schwartz & Wishingrad,

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can thus be reached independently by this Court[9] in the exercise of its constitutional function to consider "all that the legislature did or could take into

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The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. United States *Excessive Punishment Doctrine,* 24 BUFFALO L. REV. 783 (1975). *See also* BERKSON, THE CONCEPT OF CRUEL AND UNUSUAL PUNISHMENT 3 (1975). Schwartz and Wishingrad further underscore the point made in Petitioner's *Fowler* Brief, at pp. 26-45, and central to the holding of *Furman v. Georgia, supra,* that it is a mistake to view the Eighth Amendment as a single-purpose instrument directed against the isolated evil of barbarous punishments. Rather, like the other basic guarantees of the Bill of Rights, *see, e.g.,* LEVY, ORIGINS OF THE FIFTH AMENDMENT (1968), the prohibition against cruel and unusual punishments reflects a constellation of related concerns – against savagery, excessiveness, and arbitrariness in the imposition of criminal penalties – and must be construed in the light of "the broader conceptions and principles that underlie" it. Schwartz & Winshingrad, *supra,* 24 BUFFALO L. REV. at 793 n.42; *see id.* at 784, 786-793, 815-816, 827; Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional,* 83 HARV. L. REV. 1733, 1784-1798 (1970). As Mr. Justice Blackmun wrote while a Circuit Judge:

> "the emphasis is on man's basic dignity, on civilized precepts, and on flexibility and improvement in standards of decency as society progresses and matures . . . [B]road and idealistic concepts of dignity, civilized standards, humanity, and decency are useful and usable."

Jackson v. Bishop, 404 F.2d 571, 579 (C.A.8 1968).

[9] Such a judgment was reached only recently by the Supreme Judicial Court of Massachusetts in the *O'Neal* case described in note 3 *supra.* Two of the four concurring Justices in *O'Neal* rested the invalidation of Massachusetts' death penalty for rape-murder upon state due-process grounds as well as state cruel-or-unusual-punishment grounds.

account,"[10] such a judgment is unmistakably confirmed by the history of the *use* of the death penalty in this country in this century, demonstrating a dramatically progressive reluctance "to impose or authorize the carrying out of a death sentence"[11] and amounting to a national repudiation of capital punishment that "could hardly be more complete without becoming absolute"[12] (Petitioner's *Fowler* Brief, at pp. 130-140).[13]

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[10] *Weems v. United States*, 217 U.S. 349, 378-379 (1910). *See also United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938).

[11] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, REPORT: THE CHALLENGE OF CRIME IN A FREE SOCIETY 143 (G.P.O. 1967).

[12] *Furman v. Georgia*, *supra*, 408 U.S. at 300 (concurring opinion of Mr. Justice Brennan). *See* note 44 *infra*.

[13] This submission does not ignore the facts that 151 persons were committed to prison under death sentences in 1974, UNITED STATES DEPARTMENT OF JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, NATIONAL PRISONER STATISTICS, Bulletin No. SD-NPS-CP-3, *Capital Punishment 1974*, Table 7, p. 26 (November 1975), and that, by our latest count, there are now persons on death row in the United States under death sentences imposed since *Furman*. As raw numbers, these figures are not inconsiderable, but they represent only a fraction of the total number of cases in which death sentences might have been imposed. The size of the fraction is incalculable for the obvious reasons that (1) no reliable statistics are compiled regarding the numbers of potentially capital cases which receive noncapital dispositions as a result of discretionary decisions beginning with the initial police "papering" of the case and proceeding through conviction; and (2) there are extreme difficulties in estimating even the proportion of persons convicted of capital offenses who are sentenced to death, *see* Appendix F to Brief for Petitioner in *Aikens v. California*, 406 U.S. 813 (1972) [No. 68-5027], at pp. 1f-3f. Nevertheless, it is obvious that a very large proportion of potentially "capital" cases are processed through to non-capital sentences under the various evasive mechanisms that characterize

This submission, unlike the submission in Parts II of Petitioner's *Fowler* Brief and of the present Brief, does not depend fundamentally upon the perpetuation of

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the administration of post-*Furman* death-penalty laws as described in Parts II of this brief and of Petitioner's *Fowler* Brief. *See, e.g.*, Zimring, Eigen & O'Malley, *Punishing Homicide in Philadelphia: Perspectives on the Death Penalty*, 43 U. CHI. L. REV. 227 (1976). Furthermore, of course, substantial numbers of death-*sentenced* defendants are relieved of those sentences as a result of post-conviction judicial proceedings: "[t]he system has become one in which a substantial portion of those condemned are kept for years under the agonizing threat of death with intermittent reversals and retrials until such time as prosecutors or juries are willing to settle for sentences of life imprisonment." Barrett, *Anderson and the Judicial Function*, 45 SO. CALIF. L. REV. 739, 744 (1972). *See also* BEDAU, THE DEATH PENALTY IN AMERICA 36-38, 94-98 (rev. ed. 1967). And additional substantial numbers are relieved of execution by executive clemency. *See, e.g.*, Note, *Executive Clemency in Capital Cases*, 39 N.Y.U.L. REV. 136 (1964); Petitioner's *Fowler* Brief, at pp. 95-100. Professor White has recently noted that, because "both 'mandatory' and 'guided discretionary' [death penalty statutes enacted after *Furman*] . . . function in a system honey-combed with discretion," the "new systems of capital punishment [will probably] . . . not alter the fact that the death penalty is infrequently applied." White, *The Role of the Social Sciences in Determining the Constitutionality of Capital Punishment*, 45 AM. J. ORTHOPSYCHIATRY 581, 587, 589 (1975) [hereafter cited as White]. But recognizing that "the rate at which executive clemency was granted under a jury-discretionary system will be likely to underestimate the number of commutations to be expected under a 'mandatory' system," *id.* at 589 (footnote omitted), Professor White points out that the *total extent* to which post-*Furman* "mandatory" death sentences are averted in practice cannot now be known (or learned, except by a grisly experiment), since "[u]ntil a capital defendant is actually executed, it cannot be determined that the

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systems of arbitrary selectivity in the administration of capital punishment after *Furman*. It is, however, strongly reinforced in the context of such systems,

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power of executive clemency will not be exercised to spare the defendant's life," *id.* at 588 n.**.

Finally, there seems little doubt that the number of death sentences that continue to be imposed today – eight years and eight months after the last execution conducted in this country – is a function in part of the fact that many jurors do not regard a death sentence as "real" or believe that it will ever be carried out. *See* Leavy, *Mamie Lee Ward on Death Row*, 5 M.S. 70, 106 (Nov. 1975) ("None of the jurors I spoke to believed Mamie's death sentence would ever be carried out. North Carolina's last execution, in 1961, was only a distant memory to them."); Brief for Petitioner in *Aikens v. California, supra*, at pp. 40-41 n.78 ("Jurors are finding it easier to impose the death sentence in murder cases now because they believe it will never be carried out, William J. Stevens, Jr., assistant district attorney in charge of homicides, said yesterday .... Stevens emphasized that Governor Shapp has said no prisoner will be executed while he is in office. Prior to Shapp's inauguration last January, the state had observed an eight-year amnesty on imposition of the death penalty.... 'For me personally, it would resolve any residual doubts when I know it's a token gesture anyway.'"). *Compare* HUIE, THE EXECUTION OF PRIVATE SLOVIK 169 (5th Dell ed. 1974):

> "I think every member of the court thought that Slovik deserved to be shot; and we were convinced that, for the good of the division, he *ought* to be shot. But in honesty – and so that people who didn't have to go to war can understand this thing – this must be said: I don't think a single member of that court actually believed that Slovik would ever be shot. I know I didn't believe it.... I had no reason to believe it.... I knew what the practice had been. I thought that the sentence would be cut down, probably not by General Cota, but certainly by Theater Command. I don't say this is what I thought *should* happen; I say it is what I felt *would* happen. And I thought that not long after the war ended – two or three years maybe – Slovik would be a free man."

See also id. at 173, 188.

where the few convicted defendants "whose execution is not averted by one of the avenues of discretionary mercy or constitutional safeguard [are] ... sent to their death because none of a large number of actors thought they deserved to be spared."[14] The fact that the administration of Texas' capital-punishment procedures is permeated with "avenues of discretionary mercy" comparable to those found in North Carolina and described in Petitioner's *Fowler* Brief,[15] is significant for several reasons.

First, procedures that permit the spotty and sporadic application of a uniquely harsh penalty thereby vitiate the restraints of decency and conscience which can otherwise be counted on to limit legislative choice and public toleration of punishments for crime. They defeat the assurance that the ordinary safeguards of the democratic process will confine criminal penalties within the bounds of contemporary civility, since even the most awful punishments – atrocities that could never command acceptance if they were uniformly and usually applied to any legally defined category of offenses or offenders – can be stomached when inflicted only on some isolated outcasts. This dilution of political responsibility is, we think, the most important single consequence of selective and arbitrary administration of the death penalty from the point of view of constitutional adjudication. But we note it only

[14]Brief for the United States as *amicus curiae* in *Fowler v. North Carolina*, No. 73-7031, at pp. 75-76.

[15]*Compare* pages - *supra with* Petitioner's *Fowler* Brief, at pp. 45-100.

summarily here because we have discussed it in detail in earlier briefs.[16]

Second, the existence of a pervading network of mechanisms for averting the actual infliction of capital punishment upon death-eligible offenders makes it difficult to take seriously any assertion that the "legislative will is . . . frustrated if the penalty is never imposed . . . ."[17] Legislators are not unaware of the procedural systems within which their enactments operate; and anyone who has the faintest appreciation of the administration of systems of capital justice knows that statutes prescribing categories of "capital" offenses or offenders will be infrequently enforced by the execution of persons within those categories. To be sure, the legislative will *to have a death penalty on the books* is manifested.[18] But that kind of legislative will

[16]The central significance of the point in Eighth Amendment theory is developed in the Brief for Petitioner, *Aikens v. California*, 406 U.S. 814 (1972). [No. 68-5027], at pp. 13-27, appended to Petitioner's *Fowler* Reply Brief as Appendix B, at pp. 1b-15b. Its implications for the appropriate standard of judicial review under *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938), are considered in Petitioner's *Fowler* Brief, at pp. 106-107; *see also* White, *supra*, note 13, at 589-590; and its importance in the substantive determination of the constitutionality of the death penalty is discussed in Petitioner's *Fowler* Brief at pp. 120, 133-139.

[17]*Furman v. Georgia*, *supra*, 408 U.S. at 311 (concurring opinion of Mr. Justice White).

[18]Thirty-five States have enacted some form of death penalty since *Furman*. These statutes vary considerably and, for the convenience of the Court, we have summarized them in Appendix A to Petitioner's *Fowler* Brief; Appendix A to Petitioner's *Fowler* Reply Brief; and Appendix 1 to the present brief. The death penalty provisions of the federal Antihijacking Act of 1974, 88 Stat. 409, amending 49 U.S.C. § 1472, are set forth in Appendix A to the Brief for the United States as *amicus curiae* in *Fowler v. North Carolina*, No. 73-7031.

was also evidenced by the statutes of forty-one States and the federal Government at the time of *Furman* and was understandably held insufficient to justify the actual infliction of death upon a random fraction of offenders while the larger number of their indistinguishable counterparts was spared consistently with the same legislative design.

Surely, also, under both pre-*Furman* and post-*Furman* statutes, legislatures have been willing to countenance the prospect of execution of any unusual individuals who may fortuitiously fall into the meshes of a net through which many others escape. In that sense only (and equally under both forms of statutes) has the legislative judgment been made to exterminate life. Thus, when a particular human being is taken to the execution chamber and the question is asked what justification exists for killing *him*, the answer must inevitably be: no justification that distinguishes him from his survivors or explains why five or two or one, instead of fifty like offenders or no offenders, are being executed in Texas this year.

After *Furman* as before, the Texas Legislature's decision to enact a death penalty statute does not imply a determination that death is the necessary or even fitting punishment for any class of crime or criminal. It says only that death sentences can be tolerated for some fragment of defendants within the class – a fragment which may approach zero and which is selected by procedures that do not connect any particular defendant's death with the asserted reasons for putting him to death. *This* is the "legislative judgment"[19] regarding capital punishment's acceptance by modern society, its value as a deterrent, and society's need for it to reinforce social values and

[19]Brief for the United States as *amicus curiae* in *Fowler v. North Carolina*, No. 73-7031, at pp. 10-11.

incapacitate dangerous offenders"[20] which this Court is now being urged uncritically to accept.[21]

Third, the fact demonstrated compellingly by Professor Charles Black,[22] that these selective procedures inevitably entail both mistake and caprice,[23] surely must enter into the constitutional evaluation whether capital punishment is "cruel and unusual." There is no way to separate the legislative acceptance of killing people from acceptance of the consequences that some people will be killed wrongly and all will be killed arbitrarily. This again is the legislative judgment to which the Court's deference is sought as representing "the evolving standards of decency that mark the progress of a maturing society."[24]

Here, " 'procedure' and 'substance' look and become one."[25] " 'Though the justice of God [or of the legislature] may indeed ordain that some should die, the justice of man is altogether and always insufficient for saying who these may be.' "[26] Certainly we would not dispute that risks of error and arbitrariness inhere in every human administration of justice. But in the

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[20]*Ibid.*

[21]*Ibid.*

[22]BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE (1974).

[23]The concepts are summarized in *id.* at 19-21. quoted in Petitioner's *Fowler* Brief, at pp. 42-43 n.63.

[24]*Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion of Chief Justice Warren).

[25]BLACK, *op.cit.supra* note 22, at 96. *See* Petitioner's *Fowler* Reply Brief, at pp. 10-14.

[26]BLACK, *op.cit.supra* note 22, at 96.

"balancing process"[27] of Eighth Amendment adjudication,[28] the magnitude of the risk[29] in relation to the irremediability of its consequences[30] cannot proper-

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[27]White, *supra* note 13, at 593.

[28]*See Furman v. Georgia, supra*, 408 U.S. at 307-308 (concurring opinion of Mr. Justice Stewart).

[29]Professor Black's book throughout demonstrates that the risk of capriciousness and error in the administration of capital punishment is great, and his conclusion is confirmed by consideration both of the procedures provided for processing "capital" cases in Texas, *see* pages - *supra*, and other States, *see, e.g.*, Petitioner's *Fowler* Brief, at pp. 41-101, and of the results of the administration of capital justice in the past, *see, e.g. Furman v. Georgia, supra*, 408 U.S. at 313 (concurring opinion of Mr. Justice White); Petitioner's *Fowler* Brief, at pp. 43-45, 136-139; note 46 *infra*. *See also* note 51 *infra*.

[30]"It is the factors of ultimacy and irreversibility of the extreme punishment involved in the taking of human life that differentiates death as punishment from all other sanctions. While mutilation, exile, forfeiture, torture, imprisonment and all other forms of punishment have been characterized from time to time as more severe and cruel than necessary to accomplish the needs of society in repelling criminality, it is only the extinguishing of life itself that admits of no compensatory adjustment in the event it is determined that society was wrong or overly harsh in any given case. While the possibility of error does not render the imposition of death as punishment unconstitutional per se any more than does the possibility of error of conviction in non-capital cases, there is a fundamental distinction between death and imprisonment that requireds the most severe punishment, at least, to be imposed in a procedure as free from inequity as humanly possible."

Morgan v. State, Tenn. Ct. Crim. App. No. 492 (Hamilton County), decided January 30, 1976, slip opinion at 4 (opinion of Galbreath, J.). (The *Morgan* decision is described in note 51 *infra*.) *See also* Bobbitt, *Book Review*, 84 YALE L. J. 1769, 1772-1773 (1975):

(continued)

ly be ignored.[31]

Fourth, this latter point changes critically all of the specific subquestions relevant to the ultimate question of the constitutional validity of capital punishment.[32] "[T]he question [of deterrence, for example] becomes: 'If the penalty of death cannot be imposed, given the limitations of our minds and institutions, without considerable measures of arbitrariness and mistake, does the execution of citizens, some for the wrong reason, some wrongly, and some for no reason at all, deter

(footnote continued from preceding page)

> "We usually tolerate the rough justice such distinctions impose in the criminal justice process – it is in part the source of the justified pride we take in the jury system – because we are aware of the scant utility of judgment by rote. In the situation of a capital penalty, however, this means that some people will be sent to die without anyone being able to say clearly why it is *they* who are dying. The ultimate character of death should, alone, account for the contrast of our horror at this prospect with our tolerance of similar ineffable decision making when the penalties are fines or imprisonment. . . .
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> " . . . Those corrections or changes in law which represent the development of an ongoing system can be of no saving grace to a process that has put someone beyond its reach."

And see Burrill, *The Immorality of the Death Penalty*, 90 CHRISTIAN CENTURY 99, 101 (1973):

> "The death penalty is . . . the meting out of an infallible penalty by a most assuredly fallible trial system."

[31]The magnitude of the risk in relation to the irremediability of its consequences was described aphoristically by Professors Kalven and Zeisel in their observation that, "[w]hatever the differences on which [the] . . . decision [choosing some capital offenders to die while other live] hinges, they remain demeaningly trivial compared to the stakes." KALVEN & ZEISEL, THE AMERICAN JURY 448-449 (1966).

[32]BLACK, *op. cit. supra* note 22, at 23-28.

other citizens sufficiently better than long imprisonment?' "[33] "The issue of retribution similarly may be restated in this context. 'Is vengeance so indispensable a good that we should continue the capital penalty knowing that it is sometimes invoked irrationally and sometimes mistakenly, and sometimes arbitrarily forborne (even with the so-called mandatory statutes), with equally little justification?' "[34] Indeed, as Professor Herbert Wechsler has observed, the "issue of retribution" becomes a non-issue because the death penalty is not (and cannot be, under contemporary procedures and amid contemporary values) inflicted in a manner that conforms to any rational retributive objective.[35]

Fifth, The on-again off-again infliction of capital punishment at levels which our society now finds tolerable fails entirely to serve the supposed penological justifications for the punishment,[36] and thus amounts to nothing more than "the pointless and needless extinction of human life with only marginal contributions to any discernible social or public purposes."[37] So inflicted, the death penalty becomes plainly excessive,[38]

[33]The point originates with Professor Black, in the pages cited in note 32 *supra*, but is here quoted in the summary formulation of Bobbitt, *Book Review*, 84 YALE L. J. 1769, 1774 (1975).

[34]Ibid. (same).

[35]*Symposium on Capital Punishment*, 7 N.Y.L.F. 249, 255 (1961), quoted in Petitioner's *Fowler* Brief, at pp. 125-126. *See also* Petitioner's *Fowler* Brief, at p. 126 n.203. *And see* note 51 *infra*.

[36]*See* Petitioner's *Fowler* Brief, at p. 139.

[37]*Furman v. Georgia*, *supra*, 408 U.S. at 312 (concurring opinion of Mr. Justice White).

[38]*See Furman v. Georgia*, *supra*, 408 U.S. at 279-280, 300-305 (concurring opinion of Mr. Justince Brennan); *id.* at 309 (concurring opinion of Mr. Justice Stewart); *id.* at 312-313 (concurring opinion of Mr. Justice White); *id.* at 331-332, 342-359 (concurring opinion of Mr. Justice Marshall). *See also* Schwartz & Wishingrad, *supra* note 8, *passim*.

even if its theoretical justifications could be thought, under other conditions, to be more colorable than they are.[39]

Sixth, the punishment of death is the only criminal penalty used in this country today[40] which inevitably entails inflicting an unmeasurable amount of physical pain[41] and a demonstrable amount of psychological

[39]In fact, the incapacitative, deterrent and retributive justifications advanced in support of capital punishment are not colorable under any conditions relevant to the rational choice of penal sanctions in contemporary society. *See* Petitioner's *Fowler* Brief, at pp. 121-130 and Appendix E; Petitioner's *Fowler* Reply Brief, at pp. 17-19 and Appendices C and E; Appendix 3 to the present brief, *infra; Commonwealth v. O'Neal*, ____ Mass. ____, 339 N.E.2d 676, 681-688 (1975) (opinion of Chief Justice Tauro).

[40]Appendix C to the Brief for Petitioner, *Aikens v. California*, 406 U.S. 813 (1972) [No. 68-5027], collects the numerous harsh physical punishments which were authorized by law and commonly used in the United States at the time of the drafting and adoption of the Eighth Amendment.

[41]The epistemological problem here is obvious, for the physical pain experienced by an executed defendant is not susceptible to direct report. It is simply impossible to tell how rapidly oblivion comes, under any mode of execution. *See* ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, REPORT 246-273; (H.M.S.O. 1953) [Cmd. 8932]; Comment, *The Death Penalty Cases*, 56 CALIF. L. REV. 1268, 1338 (1968); BARNES & TEETERS, NEW HORIZONS IN CRIMINOLOGY 306-309 (3d ed. 1959). Nevertheless, such evidence as is available suggests that there is time for momentary suffering at least. *See* Petitioner's *Fowler* Brief, at pp. 113-114 n.173.

anguish upon the sentenced man.[42] *See generally* *Jackson v. Bishop*, 404 F.2d 571, 577-581 (CA8 1968); *Nelson v. Heyne*, 491 F.2d 352, 354-357 (CA9 1974). While this Court early recognized that the Eighth Amendment stood as a barrier against "torture," *Wilkerson v. United States*, 99 U.S. 130, 136 (1879), and other excruciating forms of physical punishment and also prohibited "the unnecessary infliction of physical pain in the execution of the death sentence," *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947), it declared that the Amendment's protections did not forbid infliction of the pain inevitably involved in "the mere extinguishment of life," *Ex parte Kemmler*, 136 U.S. 436, 447 (1890).[43] However, an arbitrary and capricious application of the penalty is

[42]*See generally*, West, *Psychiatric Reflections on the Death Penalty*, 45 AM. J. ORTHOPSYCHIATRY 689, 694 (1975); Gallemore & Panton, *Inmate Responds to Lengthy Death Row Confinement*, 129 AM. J. PSYCHIATRY 167, 168-170 (1972); Note, *Mental Suffering Under Sentence of Death: A Cruel and Unusual Punishment*, 57 IOWA L. REV. 814, 826-831 (1972). *Cf.* Bluestone & McGahee, *Reaction to Extreme Stress: Impending Death by Execution*, 119 AM. J. PSYCHIATRY 393 (1962). Two defendants, condemned under post-*Furman* statutes, have committed suicide while awaiting appellate disposition of their cases. *State of Florida v. Walter Albert Carnes*, November 19, 1974, Duval County Circuit Court No. 74-2131 CF (Div. S), *Carnes v. State*, Florida, Sup. Ct. No. 46,673, *appeal dismissed*, July 16, 1975, 316 So.2d 292; *State of Texas v. John H. Devries*, conviction of capital murder, January 23, 1974, Jefferson Country District Ct. Nos. 31,085, 31,086, cases dismissed on motion of State, November 17, 1975.

[43]"[I]f the punishment prescribed for an offense against the laws of the State were . . . burning at the stake, crucifixion, breaking on the wheel or the like, it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition." *Ex parte Kemmler* 136 U.S. 436, 446-447 (1890).

something more and vastly different than the mere extinguishment of life,[44] and invokes the "[p]rohibition against the *wanton infliction* of pain [that] has come into our law from the Bill of Rights of 1688." *Louisiana ex rel. Francis v. Resweber, supra,* 329 U.S. at 463 (emphasis added).

Finally, we suggest it is no accident that capital punishment is administered through procedures which are despairingly insufficient to preserve any reasonable expectation of an equitable, nonarbitrary application of the penalty. These procedures plainly manifest the atrocity and the basic irrationality of the punishment of death. *Because* the common consensus in our society regards death as too extreme a penalty for regular or even-handed use in even the narrowest class of generically-defined cases, it has proved impossible legislatively to prescribe objective categories of offenders for whom the penalty can be tolerated without wholesale evasion.[45] Thus we must and do use a host of evasive mechanisms to winnow the ranks of the condemned upon the basis of *ir*regular, *non*objective and *non*even-handed criteria.

Because the death penalty bears no rational relation to any legitimate penal or social objective, it is impossible to construct a rational system for its administration. Any attempt must necessarily fail to devise a reasoned selective scheme for the application of a fundamentally unreasoned sanction. In what cases is it appropriate to apply a punishment which is equally

[44]*See* BLACK, *op. cit. supra* note 22, at 95.

[45]*See McGautha v. California,* 402 U.S. 183, 204-207 (1971); Brief for the United States as *amicus curiae* in *Fowler v. North Carolina,* No. 73-7031, at pp. 59-61.

purposeless in all cases? The problem goes to the root of the death penalty. It is reflected in Sir Ernest Gowers' conclusion after chairing the most systematic and extensive Twentieth Century inquiry into the subject:

> "Before serving on the Royal Commission . . . I should probably have said that I was in favour of the death penalty, and disposed to regard abolitionists as people whose hearts were bigger than their heads. Four years of close study . . . gradually dispelled that feeling. In the end I became convinced that . . . so far from the sentimental approach leading into [the abolitionists'] . . . camp and the rational one into that of the supporters, it was the other way about."[46]

Capital punishment is *innately* sentimental and anti-rational.[47] Its incoherent and invidious applications are not merely the price we pay for having it; they are the sole commodities purchased for the price. There exist no coherent or non-invidious reasons for choosing anyone to inhale gas or undergo electric shock until he is dead.

In this case and its companion cases, the respective States (and the federal Government as *amicus curiae*) are essentially asking the Court to allow them to conduct further experiments in the practice of killing people which the national experience of this century has shown to be (1) an absolute penological failure,[48] (2) so abhorrent to contemporary American processes of justice that the discretionary operation of those

[46]GOWERS, A LIFE FOR A LIFE 8 (1956).

[47]*See, e.g.,* BARNES & TEETERS, NEW HORIZONS IN CRIMINOLOGY 31 (2d ed. 1951).

[48]*See* Petitioner's *Fowler* Brief, at pp. 121-130 and Appendix E; Petitioner's *Fowler* Reply Brief, at pp. 17-19 and Appendices C and E; Appendix 3 to the present brief, *infra.*

processes has demonstrated its repudiation in the most eloquent possible manner, by sparing from execution all but a "bare sample of the culprits whose conduct [made] . . . them eligible for [it],"[49] and (3) the source

[49]Professor Herbert Wechsler, in *Symposium on Capital Punishment*, 7 N.Y.L.F. 249, 252-253 (1961). Professor Wechsler speaks here of the death penalty at a time (1930-1959) when it was used far more frequently ("with executions ranging from 199 to 48," *id.* at 252) than it is used today. Subsequent commentators concur in describing a precipitous decline in the actual use of the penalty, to a point where "[t]he most salient characteristic of capital punishment is that it is infrequently applied," PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, REPORT: THE CHALLENGE OF CRIME IN A FREE SOCIETY 143 (G.P.O. 1967). *See, e.g.*, II NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 1350-1351 (G.P.O. 1970) ("a de facto abolition has practically become a reality in the United States"); Sellin, *Executions in the United States*, in SELLIN, CAPITAL PUNISHMENT 31, 34 (1967); Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1791-1792 (1970); Reckless, *The Use of the Death Penalty A Factual Statement*, 15 CRIME & DELINQ. 43, 50 (1969). The total number of persons executed under civil authority in the United States in each of the following represenative years and five-year periods was:

1930	155	1930-1934	776
1935	199	1935-1939	891
1940	124	1940-1944	645
1945	117	1945-1949	639
1950	82	1950-1954	413
1955	76	1955-1959	304
1960	56	1960-1964	181
1965	7	1965-1969	10
1970	0	1970-1974	0

Source: UNITED STATES DEPARTMENT OF JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, NATIONAL PRISONER STATISTICS, Bulletin No. SD-NPS-CP-3, *Capital Punishment 1974*, Table 1, pp. 16-17 (November 1975).

This American development is, of course, consistent with the "phenomenal decline" of executions on a world-wide scale,

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of an always arbitrary[50] and frequently discriminatory[51] infliction of death that can decently be viewed only as an enduring cause of national shame. But the death

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Patrick, *The Status of Capital Punishment: A World Perspective*, 56 J. CRIM. L., CRIM. & POL. SCI. 397, 408 (1965), which we have described in Appendix D to Petitioner's *Fowler* Brief.

[50]*See Furman v. Georgia, supra.*

[51]Racial discrimination in the application of the death penalty for rape has been sufficiently blatant to allow of overwhelming statistical proof.

> "Over two dozen possibly aggravating nonracial variables that might have accounted for the higher proportion of blacks than whites sentenced to death upon conviction of rape have been analyzed. Not one of these nonracial factors has withstood the tests of statistical significance. That is, in none of the seven states carefully analyzed can it be said that any of the nonracial factors account for the statistically significant and disproportionate number of blacks sentences to death for rape. . . . All the nonracial factors in each of the states analyzed 'wash out,' that is, they have no bearing on the imposition of the death penalty in disproportionate numbers upon blacks. The only variable of statistical significance that remains is race.
>
> ". . . [S]entences of death have been imposed on blacks, compared to whites, in a way that exceeds any statistical notion of chance or fortuity. . . . [W]ith the benefit of a carefully designed and objectively analyzed study of [control] . . . conditions, it can be concluded that the significant racial differentials found in the imposition of the death penalty are indeed produced by racial discrimination."

Wolfgang & Riedel, *Race, Judicial Discretion, and the Death Penalty*, 407 ANNALS 119, 132-133 (1973).

A similarly overwhelming comprehensive demonstration of racial discrimination has concededly not yet been made in connection with the death penalty for murder. This is hardly surprising, in light of (1) the costs and difficulties of undertaking the sort of elaborately controlled and exhaustive study done by Wolfgang and Riedel in rape cases, and (2) the over-all rarity of use of the death penalty, coupled with its application through procedures

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penalty in any form is no longer an experiment: it is an ancient exercise in savagery that has run its course. The time is too late now to rectify the errors of the past;

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(and with results) whose irregularity resists reduction into patterns that might serve as controls for a study of the racial factor, *see* notes , *supra;* note *infra.* But, if racial discrimination in death sentencing for murder has not been conclusively proved, there is at least very strong evidence of it in (A) the concurrence of results among several limited empirical studies that have been done, *see* Petitioner's *Fowler* Brief, pp. 136-137 n.226; (B) the coincidence of those results with the impressions of knowledgeable and responsible observers, *ibid.;* (C) the appearance in the rape studies of the same "indigent/non-indigent" racial sentencing pattern observed in murder cases, *see* Bullock, *Significance of the Racial Factor in the Length of Prison Sentences,* 52 J. CRIM. L., CRIM. & POL. SCI. 411 (1961) – that is, the tendency to treat black defendants disproportionately harshly *if* their victims are white, *see* Wolfgang & Riedel, *Rape, Race, and the Death Penalty in Georgia,* 45 AM. J. ORTHOPSYCHIATRY 658 (1975); and (D) the intuitive implausibility of the hypothesis that the same people, operating through the same procedures in rape and murder cases, have practiced racial discrimination in the rape cases but risen scrupulously above its influence when the charge is murder.

Indeed, in a recent study of 142 post-*Furman* death sentences imposed after murder convictions in the States of Florida, Georgia, Louisiana, North Carolina, Oklahoma, and Texas, Professor Riedel has noted that 87% of these cases involved victims who were white. Riedel, *Death Row 1975: A Study of Offenders Sentenced Under Post-Furman Statutes,* 49 TEMPLE L. Q. 261 (1976). [We are informed by the editors of the Temple Law Quarterly that this article will appear in March, 1976.] *Compare* Klebba, *Mortality Trends for Homicide, by Age, Color and Sex: United States, 1960-1972* (National Center for Health Statistics, Division of Vital Statistics, 1974) at 2-3 (more than half of the total number of homicide victims during 1972 were nonwhite).

such, of course, is the nature of capital punishment. It is not too late – nor is it too early – to prevent the repetition of those errors in the future.[52] Legitimate experimentation with new penological methods is

[52]The evidence described in footnote 46 *supra* allows no comforting explanation of the obvious fact that historically "Negroes [have been] . . . executed far more than whites in proportion to their percentage of the population," *Furman v. Georgia, supra,* 408 U.S. at 364 (concurring opinion of Mr. Justice Marshall). *See also* the additional authorities collected in *id.* at 364-365 n.152. Against this background, it is sobering to note that the percentage of nonwhites in the death row population according to the latest officially reported count (December 31, 1974) was not significantly different than their percentage in the official count of December 31, 1971, just preceding *Furman.* Prior to *Furman,* nonwhites comprised 329 out of a total of 620 inmates (that is, 53.1%). UNITED STATES DEPARTMENT OF JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, NATIONAL PRISONER STATISTICS, Bulletin No. SD-NPS-CP-1, *Capital Punishment 1971-1972,* Table 10, pp. 39-40 (December 1974). On December 31, 1974, nonwhites comprised 138 out of a total of 254 inmates (that is, 54.3%). UNITED STATES DEPARTMENT OF JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, NATIONAL PRISONER STATISTICS, Bulletin No. SD-NPS-CP-3, *Capital Punishment 1974,* Table 16, pp. 44-45 (November 1975).

These figures might seem to imply that the percentage of nonwhites sentenced to death pursuant to post-*Furman* death-sentencing procedures has not declined as compared with the percentage sentenced to death under the avowedly discretionary pre-*Furman* death sentencing procedures. That conclusion appears correct; but we do not wish to leave the impression that the NPS figures support it, since we are factually advised that they do not. The NAACP Legal Defense and Educational Fund, Inc., maintains an independent roster of death-row inmates, and we therefore know that the figure of 254 persons listed by NPS as "under sentence of death" on December 31, 1974, includes a considerable number of inmates sentenced to die before *Furman* whose sentences had not yet (for various reasons) been technically vacated, although they could no longer constitu-

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unquestionably desirable,[53] and the limits set upon it by the Constitution[54] must necessarily be not too confining.[55] Nevertheless, the limits of the Eighth Amendment are exceeded when the subject of the exercise is extermination of human life and when its results can be foredoubted only by the blindest self-delusion.

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tionally be carried out. Our figures do support the same conclusion, however. They were last systematically updated on January 2, 1976, at which time we were aware of 411 death-row inmates sentenced after *Furman* and knew the race of 381 of them. Among the 381, nonwhites numbered 236 (61.9%), while whites numbered 145 (38.1%). Thus, even on the extremely unlikely assumption that *every* death row inmate whose race was unknown to us was white, nonwhites comprised (on January 2, 1976) 57.4% of persons held under death sentences imposed pursuant to post-*Furman* procedures, as compared with 53.1% of persons held (on December 31, 1971) under death sentences imposed pursuant to pre-*Furman* procedures.

[53]This is why one of the tragic features of capital punishment is its tendency to absorb public attention through sensationalism while simultaneously providing a political placebo for the fear of crime. As a result, legislative and administrative failures to pursue real and realistic solutions to the complex, difficult problems of controlling criminal behavior are ignored. *Cf.* West, *Psychiatric Reflections on the Death Penalty*, 45 AM. J. ORTHOPSYCHIATRY 689, 692-693 (1975).

[54]*See, e.g., Robinson v. California*, 370 U.S. 660 (1962); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); *and see* Justice Jackson's concurring opinion in *id.* at 546-547:

> "there are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality . . . of a minority – even those who have been guilty of . . . crime."

[55]*See, e.g., Tigner v. Texas*, 310 U.S. 141 (1940).

Can there be doubt what a resumption of capital punishment in this country will show? During another couple of generations, a freakishly selected quota of offenders[56] will be killed after much agonizing and in

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[56]*See Furman v. Georgia, supra*, 408 U.S. at 310 (concurring opinion of Mr. Justice Stewart). Freakish selection continues to be inevitable under procedures such as those described in Parts II of this brief and of Petitioner's *Fowler* Brief, wherein a large number of decisionmakers (many of them operating in only one or a very few cases) make innumerable life-or-death decisions through the resolution of vaguely defined issues whose relation to the choice of life or death is problematic. In this setting, any regularity of results is made impossible by the basic obscurity of the reasons for inflicting capital punishment, and the consequently wide variability of views regarding the cases (if any) in which the death penalty is tolerable. Issues of this nature peculiarly call into play "the natural human tendency to see facts and to evaluate evidence in a manner leading to a desired conclusion," BLACK, *op. cit. supra* note , at , especially when the differences between the possible conclusions – to kill a human being or to let him live – are out of all proportion to the legal and factual distinctions upon which they turn, *see* KALVEN & ZEISEL, *op. cit. supra* note , as quoted therein. Prejudice and discrimination are also most likely to prevail in this setting. *See* note *supra;* Petitioner's *Fowler* Reply Brief, at pp. 12-14. But freakish (if not discriminatory) results are assured even upon the assumption that every individual involved in the decision of capital cases always and unfailingly acts with the utmost conscientiousness and good will. *See* BLACK, *op. cit. supra* note 22, at 94. For death is too extreme and extraordinary a penalty for conscientious, well-intentioned persons in our society to decree through solemn judicial proceedings without first making an intensely-felt condemnatory judgment that permits them to suspend their sense of common human brotherhood with the prisoner. The collision of such strong emotions as the need to express outrage at a criminal atrocity and abhorrence of participating in a legal one cannot possibly produce a coherent or consistent pattern of such judgments. As different decisionmakers differ in their reactions to the gravity of the responsibility that they hold and the imponderability of the decision that they are obliged to make, so, too, will their particular judgments differ. *Id.* at 16-17, 21, 46-47, 49-50.

(continued)

progressively diminishing numbers until the death penalty falls of its own weight or until its last remnants are judicially condemned upon evidence of its historical

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(footnote continued from preceding page)

Three consequences follow. (1) Within any group of indistinguishable offenders (*i.e.*, those whose offenses and personal characteristics differ only in details that no rational mind could deem relevant to a choice of punishment), some will be killed and some will be spared. (2) The decision to kill or to spare *distinguishable* offenders will be made haphazardly because differing prosecutors, judges, juries and governors will choose differentially to act upon or to ignore available distinctions among the offenses or personal characteristics of these offenders, *See, e.g.*, KALVEN & ZEISEL, *op. cit. supra* note 31, at 438-439, 444; and the same characteristic (intoxication, drug addiction, mental abnormality short of insanity, prior relations between the defendant and victim, etc.) may arouse the sympathy of one decision-maker and the antipathy of another. (3) Even distinctions that are repeatedly made in the selection of offenders to live or die need not conform to the legislative purposes for authorizing capital punishment or to the justifications for capital punishment which are now being urged upon this Court in support of its constitutionality; and the fact that a distinction is frequently made (or that a factor is commonly given decisive weight in the selection of defendants to live or die) does *not* mean that the distinction (or the factor) will not be inexplicably and capriciously ignored by particular decision-makers in particular cases, *see id.* at 435-444; Note, *A Study of the California Penalty Jury in First Degree Murder Cases*, 21 STAN. L. REV. 1299, 1420 (1969). In all of these regards, nothing has changed since *Furman. See* Browning, *The New Death Penalty Statutes: Perpetuating a Costly Myth*, 9 GONZAGA L. REV. 651, 661-662 (1974), quoted in Petitioner's *Fowler* Brief, at pp. 44-45; White, *The Role of the Social Sciences in Determining the Constitutionality of Capital Punishment*, 13 DUQ, L. REV. 279, 289 n.69 (1974). *See also Morgan v. State*, Tenn. Ct. Crim. App. No. 492 (Hamilton County), decided January 30, 1976, slip opinion at 9 (opinion of Russell, J.):

> "The Tennessee statutes providing for the death penalty for first degree murder . . . facially make the punishment

(continued)

repudiation that can scarcely be clear than now. But what earthly purpose can these deaths serve?

(footnote continued from preceding page)

> mandatory. This, however, is but a sham of the clearest transparency. All charges of first degree murder include second degree (as well as other lesser included offenses); and the legislature increased the maximum punishment for second degree murder to life. With all respect to my brethren who held in *Collins v. State* . . . that our death penalty statute is constitutional, in that very case, wherein the defendant was charged with two first degree murders committed at the same time and in substantially the same way, the jury found one of them to be first degree, setting death by electrocution, and found the other to be second degree, setting a ninety-nine year prison sentence.
>
> "I have no empirical data on the history of the use of this relatively new (1974) statute, but the half dozen or so death penalty appeals that have reached panels of this court that I have sat upon demonstrate clearly (1) that it is not being regularly set in murder cases, and (2) some of the cases, like *Collins*, are internally inconsistent. One pending case involves a felony murder in which two of the three defendants were found guilty of first degree murder and sentenced to death, while the third was convicted of only voluntary manslaughter for his participation in the same robbery-murder."

In the *Morgan* case, a panel of the Tennessee Court of Criminal Appeals (with one dissenter) held Tennessee's 1974 death-penalty statute (described in Petitioner's *Fowler* Brief, at App. A, pp. 57a-58a) unconstitutional under *Furman v. Georgia, supra*, because, although "mandatory" in form, it was administered through discretionary mechanisms such as we have described in Parts II of this brief and of Petitioner's *Fowler* Brief. As noted in the passage of Judge Russell's opinion just quoted, another panel of the same court sustained the constitutionality of the statute in *Collins v. State*, Tenn. Ct. Crim. App., No. 63 (Hamblen County), decided September 26, 1975; and the issue is now before the Supreme Court of Tennessee.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 74-6257

TROY LEON GREGG,
Petitioner,

v.

GEORGIA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR RESPONDENT

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TABLE OF CONTENTS

	Page
OPINION BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
Constitutional and Statutory Provisions Involved	3, App. A
Constitutional Provisions . .	3
Statutory Provisions.	App. A
1. Statutory Provisions, Ga. Laws 1973, p. 159 . .	1a
2. Capital Crimes	16a
a. Current Capital Crimes	16a
b. Perjury	20c
3. Prosecutorial and Grand Jury Discretion.	20a
4. Oaths	25a
5. Execution	28c
6. Clemency	35a
STATEMENT OF THE CASE	4

Page

SUMMARY OF ARGUMENT. 18

I. Meaningful Discretion Characterizes the Georgia Death Penalty Provisions. . . 20

A. Introduction. 20

B. Death Sentence Discretion Is Confined By Aggravating Circumstance Criteria to Only the Most Abhorrent Crimes 22

C. Structuring of Discretion Continues at the Appellate Level 41

II. Executive Discretion. 57

A. The Prosecutor 57

B. Executive Clemency . . . 63

III. The Death Penalty Is Not Per Se Cruel and Unusual Punishment Condemned by the Eighth or Fourteenth Amendments to the United States Constitution. 66

A. The Standard of Review. . 66

B. The Legislature in Enacting a Death Penalty Statute Determined that Such a Penalty Was Not Excessive and is Justified Under Certain Conditions. . 71

Page

C. The Georgia Jury's Imposition of the Death Penalty Is In a Non-Arbitrary and Non-Capricious Manner . . 86

CONCLUSION 93

APPENDIX

A. Statutory Provisions. . . 1a

B. Trial Judge's Report . . 1b

C. Homicide Totals 1c

TABLE OF AUTHORITIES

Anderson v. State, No. 28527, (Ga. S.Ct. Appeal dismissed as premature, Apr. 8, 1974) . . 24

Atkins v. State, 231 Ga. 441, 202 S.E.2d 62 (1973) 24,44

Bailey v. State, 153 Ga. 413, 112 S.E. 453 (1922). 54

Banks v. State, 235 Ga. 121 (1975).24,44

Barrow v. State, 235 Ga. 635(1975).24,44

Berryhill v. State, 235 Ga. 549 (1975) 23,32,52

Brown v. State, 235 Ga. 644(1975). 24,27,44

Caldwell v. Paige, 230 Ga. 456; 197 S.E.2d 692 (1973). 61

Page

Cargile v. State, 194 Ga. 20;
20 S.E.2d 416 (1942) 60

Chenault v. State, 235 Ga. 216;
215 S.E.2d 233 (1975). 23,34

Coker v. State, 234 Ga. 555,
216 S.E.2d 782 (1975) 23,33,50

Coley v. State, 231 Ga. 829;
204 S.E.2d 612 (1974). 21,24,33,
41,50,51

Dobbs v. State, No. 30453,
(Ga. S.Ct., Feb. 24, 1976) . . . 23,32,38,52

Eberheart v. Georgia, 47 Ga. 598
(1873) 23,50,76

Eberheart v. State, 232 Ga. 247,
206 S.E.2d 12 (1974) 26

Echols v. State, 231 Ga. 633,
203 S.E.2d 165 (1974). 33

Furman v. Georgia, 408 U.S. 238
(1972) 70,71,75,78,
79,80,84,86,
87

Floyd v. State, 233 Ga. 280,
210 S.E.2d 810 (1974) 23,24,32,
36,37,52

Goodwin v. State, No. 30587,
(Ga. S.Ct., Feb. 24, 1976) . . . 23,32,51,52

Page

Gregg v. State, 233 Ga. 117,
210 S.E.2d 659 (1974). 23,24,32,55

Hooks v. State, 233 Ga. 149,
210 S.E.2d 668 (1974). 23,26,30,50

House v. State, 232 Ga. 140,
205 S.E.2d 217 (1974). 23,32,52

Jarrell v. State, 234 Ga. 440,
216 S.E.2d 258 (1975). 23,24,32,35,
44,49,52

Jordan v. State, 233 Ga. 929,
214 S.E.2d 365 (1975) 22

Kemmler, 136 U.S. 436 (1890) . . . 78

Kimball v. State, 63 Ga. App. 183;
10 S.E.2d 240 (1940) 54

Louisiana ex rel. Francis v.
Resweber, 329 U.S. 459 (1947). . 78

McCorquodale v. State, 233 Ga. 369,
211 S.E.2d 577 (1974). 23,23,38

McGautha v. California,
402 U.S. 183 (1971) 45,68,78,
86,87,88

Mason v. State, No. 30338,
(Ga. S.Ct., Jan. 7, 1976). . . . 23,30,33

Miller v. State, 224 Ga. 627,
163 S.E.2d 730 (1968) 50

Mitchell v. State, 234 Ga. 160,
214 S.E.2d 900 (1975) 23,26,32,37,
38,41,52

Page

Moore v. State, 233 Ga. 861, 213 S.E.2d 829 (1974) 23,26,32, 50,51,52

Owens v. State, 233 Ga. 869, 214 S.E.2d 173 (1974). 24,44,46

Paige v. Potts, 354 F.2d 212 (5th Cir. 1965) 61

Paige v. State, 219 Ga. 569; 134 S.E.2d 793 (1964). 61

Powell v. Texas, 392 U.S. 514 (1968) 72

Prevatte v. State, 233 Ga. 929; 214 S.E.2d 365 (1975) 22,24,32, 44,47

Pulliam v. State, No. 30594, (Ga. S.Ct., Feb. 24, 1976) . . . 23,32

Reid v. Covert, 352 U.S. 1 (1957). 89

Reynolds v. State, 132 Ga. App. 89; 207 S.E.2d 630 (1974) 60

Ross v. State, 233 Ga. 361; 211 S.E.2d 356 (1974) 23,32,50

Smith v. State, Nos. 30205 and 30268 (Ga. S.Ct. Jan. 6, 1976) . 22,23,40, 49,51

Snyder v. Mass., 291 U.S. 97 (1934) 92

Page

Stack v. State, 234 Ga. 19, 214 S.E.2d 514 (1975) 24,43,44

State v. Shiren, 9 N.J. 445; 88 A.2d 601 (1952) 59

Swain v. State, 91 Ga.App. 561; 86 S.E.2d 642 (1954) 38

Tamplin v. State, 235 Ga. 20; 235 Ga. 774 (on rehearing) (1975) 24,32,51

Trop v. Dulles, 356 U.S. 86 (1958) 67,68,72,78

Turner v. State, 235 Ga. 826, ___ S.E.2d ___ (1976) 27

United States v. Crockett, 506 F.2d 759 (5th Cir. 1975) . . 35

Weems v. United States, 217 U.S. 349 (1910) 66,69,72,78

Williams v. New York, 337 U.S. 241 (1949). 79

Witherspoon v. Illinois, 391 U.S. 510 (1968) 45,86

Page

STATUTES

United States Constitution, Eighth Amendment 3

United States Constitution Fourteenth Amendment 3

Ga. Code Ann. § 2-3011 64,65

Ga. Code Ann. § 2-2902 58

Ga. Code Ann. § 2-2908 58

Ga. Code Ann. § 2-2915 58

Ga. Code Ann. § 26-1101 22

Ga. Code Ann. § 26-1301 39

Ga. Code Ann. § 26-1305 38

Ga. Code Ann. § 26-1311 22

Ga. Code Ann. § 26-1901 22,74

Ga. Code Ann. § 26-1902 74

Ga. Code Ann. § 26-2001 22,39

Ga. Code Ann. § 26-2201 22

Ga. Code Ann. § 26-2401 22

Ga. Code Ann. § 26-3102 27,30

Page

Ga. Code Ann. § 27-1801 58

Ga. Code Ann. § 27-2401 42

Ga. Code Ann. § 27-2503 25,26,47

Ga. Code Ann. § 27-2514 30

Ga. Code Ann. § 27-2528 25

Ga. Code Ann. § 27-2534 25

Ga. Code Ann. § 27-2534.1 . . . . 27,28-29,31, 34,35,38,39, 40,52

Ga. Code Ann. § 27-2537 . . . . . 30,34,37,41, 42,43,44,48, 49,52,53

Ga. Code Ann. § 70-301 42

Ga. Code Ann. § 77-511 64

REGULATIONS

Code of Professional Responsibility EC 7-13 58

Code of Professional Responsibility DR 7-103 58

Page

OTHER AUTHORITIES

Black, Capital Punishment: The Inevitiability of Caprice and Mistake (1974). . . . 38

Cahn, The Sense of Injustice: An Anthropomorphic View of the Law (1949) 83

Jerusalem Post, July 9, 1974 . . 74

Leiser, Liberty, Justice and Morals, (1973) 74,80,83

Murphy, Kant: The Philosophy of Right (1970) 81

Report on Royal Commission on Capital Punishment (1949-1953) 75,88

Tocqueville, Democracy in America 89

Trial (March, 1976). 81

IN THE

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NO. 74-6257
OCTOBER TERM 1975

TROY LEON GREGG,

Petitioner,

v.

GEORGIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT

OPINION BELOW

The decision of the Supreme Court of Georgia is reported at Gregg v. State, 233 Ga. 117, 210 S.E.2d 169 (1974).

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on October 17, 1974. Motions for rehearing by the State and by the defendant were denied on October 29, 1974. On January 27, 1975, petitioner requested an extension of time for petitioning for a writ of certiorari, and on February 5, 1975, Mr. Justice Powell ordered that the time for filing the petition be extended through March 28, 1975. The petition was filed on March 27, 1975, and was granted on January 22, 1976. Jurisdiction obtains under 28 U.S.C. § 1257(3) (1970).

QUESTION PRESENTED

Would petitioner's execution for the witness-elimination murder and robbery of two men be a cruel and unusual punishment, violative of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment, when petitioner's death sentence has been imposed, and would be carried out, under a revised, Georgia procedure, enacted to insure that capital punishment shall not be administered in an arbitrary or capricious manner?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional Provisions

This case involves the Eighth Amendment:

> "Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishment inflicted."

This case also involves the Fourteenth Amendment:

> ". . .[N]or shall any State deprive any person of life, liberty, or property without due process of law. . . ."

The statutory provisions involved are set forth as Appendix A to this Brief [hereinafter cited as "App. A at _____").

STATEMENT OF THE CASE

The jury sentenced Troy Leon Gregg to death for killing Fred Simmons and Robert Moore, working men, who were giving him a ride from Florida when he shot and robbed them on Thanksgiving eve, 1973, near Atlanta. (R. 3, 14, 15, 19 [indictment and sentences of death for murder and armed robbery]; T. 122, 287-88, 311).

The bodies were found Thanksgiving morning, November 22, in a drainage ditch by the Lawrenceville Highway exit, on Interstate 85, the main road northeast from Atlanta. (T. 221). When the chief investigating officer, Gwinnett County Detective Bert Blannot, arrived at the scene about 7:45 a.m., other officers already had secured the area. (T. 221, 231-32). Police looked unsuccessfully for weapons. (T. 238). On Simmons, they found personal papers from which his wife was contacted. (T. 223, 233). Moore's body did not have any identification, but police did find a gas station receipt on him, which listed a Florida car tag number. (T. 230, 232, 236; State's Exhibit 24). From the number police obtained a tentative description of the car as a 1960 Pontiac, maroon on white. (T. 230, 234).

Dr. Bryan Dawson of the Georgia State Crime Laboratory arrived about 11:00 a.m. to examine the bodies. (T. 87). He made a brief examination at the scene and then had the bodies removed for autopsies that afternoon. (T. 89). After the autopsies,

Dr. Dawson concluded that Moore died from a bullet wound in the back of his head, and Simmons died from a bullet wound in the temple. The men probably had died ten to fifteen hours before Dr. Dawson first saw them at 11:00 a.m. (T. 87-96).

Moore was of average build; Simmons was a small man. (T. 110). From blood alcohol tests, it was probable that each man was heavily intoxicated when he died. (T. 93, 97, 100-01). Dr. Dawson specifically looked for signs that either man was in an altercation. The evidence was mixed, but Dr. Dawson concluded that the most significant evidence -- facial abrasions -- had occurred just after death and were probably sustained from a fall into (the) drainage ditch." (T. 97-98, 101-07, 110, 112). The facial abrasions ran up and down the face, as if the body had been dragged or pushed, and an open cut on the face of Simmons did not have bleeding underneath the skin or powder tattooing from the pistol shot. The absence of bleeding indicated loss of blood pressure and the absence of powder tattooing when it was present in the bullet wound near the abrasion, indicated that the bullet wound occurred first. (T. 97-98, 104).

The morning after Thanksgiving, Gwinnett County police received a telephone call from Dennis Weaver, 22, of Springfield, Missouri. (T. 131, 228). He called after he had read about the killings in the Friday morning newspapers in Atlanta and recognized Simmons and Moore as the two men, who had given him a ride to Atlanta from north Florida two days before. (T. 131-32).

Police interviewed Weaver, and he added to the clue they had that they were seeking a 1961 maroon on white Pontiac. He also told police about two other hitchhikers, who already were in the car when Simmons and Moore stopped for Weaver. (T. 117-18, 133-35, 228-30, 234). The other passengers were "Troy", (i.e., petitioner, Troy Leon Gregg), and "Sam", (petitioner's side-kick Floyd Raiford Allen, III). (T. 117-18). Weaver described the suspects in detail and drew a picture of petitioner, the man he knew as "Troy". (T. 134-35, 155-56, 162-64; State's Exhibit 19).

All four men were in the car when Weaver got out in Atlanta about 11:00 p.m., not far from the death scene and within the time period established by Dr. Dawson for the time of death. (T. 130, 231). Weaver told police the other four men had discussed going to Asheville, North Carolina, so a detailed description of the car and the two suspects was teletyped to that city. (T. 121-22, 127, 134, 163-64, 238-39).

On the afternoon of November 23, Asheville police spotted petitioner and Sam Allen as they were riding around in the victims' car as described. (T. 161, 164). Petitioner had a pistol protruding from his hip pocket, which ballistics tests proved to be the murder weapon. (T. 76-78, 84, 165-66).

He also was carrying $107 in cash. (T. 166). Inside the glove compartment of the stolen Pontiac was a bill of sale made out to "Fred E. Simmons" by a dealer in Winter Garden, Florida. (T. 168-69; State's Exhibit 22). Also in the car were some old clothes and boots. Petitioner himself was wearing new boots. (T. 172). He told police that he and Sam had spent the night at a motel, and there police found a new stereo for an automobile. (T. 173). Sam had a cut lip. (T. 177).

Police gave petitioner a Miranda warning and told him that he was a murder suspect for the Georgia slayings. (T. 165, 170-71, 179-80, 262). Within fifteen minutes, while processing in at the station, petitioner signed a standard rights waiver. (T. 165, 170-71, 262, State's Exhibit No. 25).

Asheville police questioned petitioner about an armed robbery there, but they did not question petitioner about the Georgia crime. (T. 180-81, 190). Instead, they notified the Gwinnett County Police Department in Lawrenceville, Georgia, of the arrest and of the suspects' names. Gwinnett County detectives immediately secured arrest warrants for Sam Allen and petitioner and drove to Asheville. (T. 191, 204, 239-240). They first say petitioner at a magistrate's office about 9:30 that night, when he waived extradition. (T. 182, 241-42). He also agreed then to talk with Detective Blannot saying he understood his rights. (T. 243, 253, 281). Blannot told petitioner that petitioner was under arrest for Simmons' murder. (T. 295, 321).

After at first denying he knew anyone named Fred, petitioner gave Blannot a statement in Asheville, which was reduced to writing and signed. (T. 242-43, 248-49, 250-54, 281-83, 295, 300; State's Exhibit 26). In the statement petitioner admits shooting Moore and Simmons and admits that he and Sam Allen left with the car and about $400 to $500 in money belonging to Moore and Simmons. However, petitioner justified the slaying as self-defense. According to him, Moore and Simmons had picked up himself and Allen in Florida and tried to put them out in Atlanta without their personal belongings. A fight occurred and petitioner had to shoot Simmons and Moore who were attacking him and Sam with a pipe and knife. (T. 282-83; State's Exhibit 26).

After Sam Allen's interview ended, he and petitioner were driven back to Georgia in separate cars. (T. 284-86). The trip to Lawrenceville began about 12:30 or 1:00 a.m. and lasted about four hours. (T. 181, 250-51, 255, 283-84, 322-23). The group in petitioner's car conducted only a general conversation and did not discuss the slayings. Petitioner was loosely handcuffed and was freed during stops for doughnuts and coffee. At times he dozed. (T. 256-57, 284-85, 290-91, 322, 348-49). There were two exits to Lawrenceville off I-85. The officers

drove to the second exit, in part because it was the crime scene and they wanted to establish in their own minds what had taken place. (T. 276, 289-90). Both groups stopped there, and Sam Allen gave the following account of the shooting in front of Petitioner:

"Sam told us that he had been sitting in the back seat of the 1960 Pontiac and was about half asleep that he woke up when the car stopped. That the two victims got out, Fred and Tex, got out, and Sam told us as soon as they got out, Troy turned around and told him, he said, get out, we're going to rob them. Sam told us that he got out and walked toward the back of the car and looked around and could see Troy at the car, with a gun in his hand, laying up on the car, so he could get a good aim, the two men had gone down the bank and had relieved themselves and as they were coming up the bank, according to Say, Troy fired three shots, one of the men fell, the other staggered, Troy then circled back around the back, or rear of the car and approached the two men, both of which were now laying in the ditch. He placed the gun to ones head and pulled the trigger then went quickly to the other one and placed the gun to his head and pulled the trigger again, he then took the money, whatever contents were in their pockets, he told Sam, to get in the car and they drove away." (T. 287). (Sic).

At this point, according to the trial testimony of Detective Blannot:

> "Chief Crunkleton asked Troy if that was how it happened and Troy replied, after hanging his head and looking at the ground, 'Yes, it was'. . . . Chief Crunkleton then asked him these words, I quote, 'You mean you shot these men down in cold-blooded murder just to rob them . . . and Troy replied, yes and Chief asked him why, and he said he didn't know." (T. 287-88).

Petitioner and Allen were taken from the crime scene to the police station, where Blannot reduced the new oral account to writing and presented it to Petitioner. This time Petitioner refused to sign. (T. 288, 293, 324).

In follow-up investigation, police found Trooper D. J. Cobb, a Florida highway patrolman. He had come upon Simmons and Moore after their Ford broke down in Florida and took them to buy a 1960 Pontiac on the day before Thanksgiving. He was able to identify two other passengers as petitioner and Allen. (T. 206-12).

The Monday after the arrest, November 27, 1973, attorneys Jim Henderson and Stan Sunderland were appointed to represent petitioner and Sam Allen. (Trial Judge's Report, last page; App. B, p. 86). They represented petitioner at a commitment hearing on the 27th. On December 17, the grand jury indicted petitioner for the murders and armed robberies of both Simmons and Moore, under Ga. Code §§ 26-1101 and § 26-1902. (R. 3-6). On December 21, the trial court appointed petitioner's present counsel to represent him because of possible conflict of interests between petitioner and Allen. (Trial Judge's report, App. B, p. 86; R. 8; T. 188). On December 31, the District Attorney served petitioner's attorney with a notice of statutory aggravating circumstances, which the district attorney expected to prove in order to seek the death penalty, and also made his investigative file available. (R. 6-9; T. 188).

The trial court then granted a motion by petitioner to continue the case from the January to the February calendar. (R. 8-9; Trial Judge's Report, App. B, p. 6b).

The trial lasted from February 4 to February 7. Four panels and a partial fifth panel were put upon Petitioner. (T. 1, 17, 30, 39, 49). Three jurors were struck for cause because they could not vote to impose a death penalty under

any circumstance. (T. 2-4, 31). No other jurors expressed scruples against the death penalty. The State exercised eight of its ten strikes, the defendant the maximum, 20. (T. 56-60).

The State's case-in-chief consisted essentially of proving the investigation, admissions, and confession described above. Petitioner's case-in-chief consisted of his own testimony. [Neither side called Sam Allen. He appeared only to be identified by weaver.] Petitioner's testimony substantially tracked what he told Detective Blannot in Asheville. (T. 282-83, 308-25). The State attacked the testimony in several ways and also relied on the admissions petitioner was willing to make.

Although he said he was defending himself and Sam Allen and denied meaning to kill Simmons and Moore, petitioner continued to admit shooting them. (T. 324). He also admitted that Detective Blannot gave an accurate description of the account of the robbery and murder Sam Allen made in his presence back at the crime scene. (T. 349). He disputed Blannot's word that petitioner admitted then that Sam was telling the truth. (T. 350).

Whereas petitioner admitted in Asheville that he and Allen took the car and money, at trial he blamed the theft on Allen, saying he stood by nervously as Sam looted the bodies and drove off only because he was scared. (T. 283, 320-21, 325, 329-30).

On cross-examination, petitioner admitted that he and Simmons left St. Cloud with about $8 to $10 between them. He also admitted seeing Simmons and Moore with money and admitted that it was fair to say that Bob Moore had "a wad" of money. (T. 316, 318, 327-328).

During the trial petitioner explained the fact that Moore was shot twice by saying that his automatic pistol was light on the trigger and it went off twice. (T. 334). Petitioner could not explain why one of Moore's wounds was in the cheek and the other was in the back of the head. (T. 90, 338). Petitioner also admitted that the two victims were drinking heavily and Simmons was drunk and having difficulty keeping his balance. (T. 342).

Petitioner's cross-examination ended with his identification and explanation of a letter he wrote to Sam Allen when both were in jail awaiting trial. (T. 350). The letter is entitled "A statement for you" and instructs Sam to memorize it and burn it. (State's Exhibit 29).

Petitioner said he wrote the account, which was consistent with his own story, at Sam's request. (T. 350, 352). Petitioner denied that he wrote portions of the letter, including the instructions to memorize and burn it. (T. 351-354).

In rebuttal, the State called two witnesses. A Crime Lab handwriting analyst said that petitioner had written the whole letter to Sam, except that she did not reach an opinion on who had written a portion addressed "Sam Allen, No. II". (T. 360-61).

Petitioner's testimony that he had not meant to kill Simmons and Moore was impeached by the testimony of Detective William Gibson of Asheville. Gibson testified that petitioner asked him for a cigarette and in the course of this conversation, Gibson asked petitioner why he shot these people. Petitioner's response was, "By God, I wanted them dead." (T. 379-380).

In his own rebuttal, Petitioner said he did not recall the conversation with Detective Gibson and did not make the statement Detective Gibson attributed to him. (T. 381). At the conclusion of the evidence, the jury was instructed to find petitioner guilty or not guilty of murder. The instructions included a charge on the justifications of self-defense and defense of others. (T. 430-31, 450). On the armed robbery charges, the jury was instructed that if it first determined that petitioner was not guilty of armed robbery, then it could consider whether he was guilty of robbery by intimidation. (T. 439).

The verdict was guilty of murder and armed robbery on all four counts.

During the punishment phase of trial, both sides made argument to the jury without tendering further evidence. (T. 455-473).

In its instruction concerning punishment, the Court told the jury that it was the duty of the jury to determine the penalty for each offense. The authorized punishments for murder were: "death by electrocution, . . . or imprisonment for life." The authorized penalties for armed robbery were death,

imprisonment for life, or a set term within a range of one to twenty years.

The court then told the jury to determine whether there were statutory, aggravating circumstances present beyond reasonable doubt. The court defined these statutory aggravating circumstances and explained that if the jury found them present beyond a reasonable doubt, it "would be authorized to consider imposing the sentence of death." If the jury did not find the presence of statutory aggravating circumstances, it could not consider the death sentence. The court next explained that the statutory instructions would go out with them in written form, along with a form for the verdict. The court then explained:

"In arriving at your determination as to what sentence is appropriate, you are authorized to consider all the evidence received here in court presented by the State and the defendant throughout the trial before you. You are authorized to include in your consideration the facts and circumstances, if any, in mitigation and aggravation. Mitigating circumstances are those which do not constitute a justification of excuse for the offense in question, but which, in fairness and mercy may be considered as a extinuating or reducing the degree of moral culpability of punishment.

> "Aggravating circumstances are those which increase the guilt or innormity of the offense or add to its injurious consequence." (T. 476). (Sic).

The jury found the presence of statutory aggravating circumstances and imposed the death penalty on each count.

On appeal to the Supreme Court of Georgia, petitioner attacked the constitutionality of the death penalty, and raised several other issues. The Supreme Court held: (1) Although the issue was not argued, the evidence was sufficient. (2) The trial court was correct in not charging voluntary manslaughter because there was no evidence to support a finding of "sudden, violent, and irresistable passion resulting from serious provocation." Ga. Code § 26-1102. (3) For the armed robbery conviction, there was sufficient evidence to show possession of the car in Simmons and the taking of money from Moore. (4) The arrest was made with probable cause under circumstances which justified the absence of a warrant; the Miranda warning was not stale as a matter of law, and the evidence supported the voluntary and knowing nature of the confession. Since the State proved petitioner's own admission, other than Allen's account, there was no confrontation problem. (5). The death penalty was not unconstitutional.

The Supreme Court affirmed the convictions and the death penalties for murder. It vacated the death sentences for armed robbery on two grounds: First, since the armed robbery counts were used

in statutory aggravation of the murder counts, the murder counts could not be bootstrapped into aggravation of the armed robbery. Second, the death sentences for armed robbery were disproportionate under Ga. Code Ann. § 27-2537(c)(3) since Georgia juries rarely impose it for that crime.

SUMMARY OF ARGUMENT

I.

To retain the death penalty, the General Assembly of Georgia enacted Ga. Laws 1973, p. 159. This act greatly narrows the jury's discretion to impose the death penalty, allowing it only for the most outrageous crimes and for crimes which may be thwarted by the threat of the supreme price. In each individual case sentences continue to be tailor-made by those who have participated in the full trial firsthand. This remaining, controlled discretion is further structured by the Supreme Court of Georgia. The 1973 act provides for automatic and swift appellate review to assure, first, that the death penalty will not be carried out unless the evidence supports the finding of one of these especially serious crimes. Second, the sentence is set aside if the death penalty is only rarely imposed for such acts. Finally, the sentence is reviewed to assure that the record does not manifest arbitrariness or discrimination. Each of these restraints has been applied effectively under the new act, and petitioner's sentence is demonstrably rational, authorized, and proportionate. He falls within a well-defined class of witness-elimination

murderers, on whom death sentences are consistently imposed.

II.

The General Assembly of Georgia has determined that the death penalty in Georgia serves effectively the purpose of a deterrent to other capital crimes, notably the elimination of a witness or witnesses to an armed robbery and other enumerated purposes. The General Assembly has determined that the protection of the citizens of this State from certain convicted criminals may only be accomplished through the use of the death penalty. Since the death penalty is the only effective deterrent for certain criminal behavior it is not excessive or unjustified and thus is constitutional under the Eighth Amendment.

I.

MEANINGFUL DISCRETION CHARACTERIZES THE GEORGIA DEATH PENALTY PROCEDURES.

A. Introduction

After Furman, the elected General Assembly of Georgia retained a discretionary death penalty but under controlled conditions. The statute, Ga. Laws 1973, p. 159, provides for a meaningful exercise of discretion by adding to the checks and balances, which already characterized Georgia procedure in any criminal case.

The General Assembly itself continues to determine when a death penalty may never be imposed. To the necessity of finding a defendant guilty of a capital crime, there is now added a requirement in all capital cases except treason and aircraft hijacking, that a statutorily-defined, aggravating circumstance be present beyond reasonable doubt. Together, these definitions of crime and punitive circumstance limit capital punishment to only the most outrageous crimes (manifesting democratic abhorrence and condemnation of such acts), and to crimes which especially need to be thwarted by the ultimate threat (e.g., treason and murder of public servants, whose duties place them in great danger).

If these criteria of crime and circumstance are satisfied, the General Assembly has given the trial judge and the trial jury the responsibility for

perceiving, through their firsthand knowledge, the varied and possibly subtle reasons for imposition and non-imposition in a given case. The Supreme Court of Georgia, in turn, has the responsibility for insuring even-handed sentencing. Through an "automatic and swift appellate review," it sees that no trial court imposes an unauthorized or arbitrary death penalty or one disproportionate to the penalties in similar cases. Coley v. State, 231 Ga. 829, 834, 204 S.E.2d 612 (1974).

The new format, which thus works to regularize the death penalty population, is not adrift in an otherwise arbitrary "non-system". To the contrary, it is anchored within a traditional, criminal justice process, whose course has always been bounded by reason: from its very beginning -- e.g., in a trained detective's first pursuit of a clue, like the tag number found beside the victim Moore in this case -- to the day of reckoning, for even clemency cannot be granted without joint, reasoned action by independent agencies, answerable to yet others.

B. Death Sentence Discretion is Confined by Aggravating Circumstance Criteria to Only the Most Abhorrent Crimes.

There are seven crimes for which, and only for which, the Criminal Code of Georgia authorizes the death penalty. These are murder, rape, armed robbery, kidnapping for ransom, kidnapping where the victim is harmed, aircraft hijacking, and treason. Ga. Code §§ 26-1101, -1311, -1902, -2001, -2201 (1972 Rev.); App. A. at 16a-18a. These capital felonies are defined as they were when Furman was decided, but the General Assembly narrowed the list in the death penalty statute of 1973 by eliminating capital perjury (perjury leading to another's sentence of death or imprisonment for life). Ga. Laws 1973, pp. 159, 163 [Ga. Code Ann. § 26-2401 (Supp. 1975)].

As of March 16, 1976, 41 death penalty cases had been docketed in the Supreme Court of Georgia under the 1973 Act, and 30 of these had been decided. 1/

1/ The figures are for individual cases. Two decisions announce dispositions of companion cases. Smith, a/k/a Machetti v. State, No. 30205, and Smith v. State, No. 30268 (Ga. S.Ct., Jan. 6, 1976) (husband and wife, premeditated murder for insurance); Prevatte v. State and Jordan v. State, 233 Ga. 929, 214 S.E.2d 365 (1975) (co-defendants).

Of the 19 full affirmances, the majority of the defendants, like petitioner, had committed murder. Goodwin v. State, No. 30587 (Ga. S.Ct., Feb. 24, 1976); Dobbs v. State, No. 30453 (Ga. S. Ct., Feb. 24, 1976); Pulliam v. State, No. 30594 (Ga. S.Ct., Feb. 24, 1976); Mason v. State, No. 30338 (Ga. S.Ct., Jan. 7, 1976); Smith v. State, Nos. 30205, 30268 (Ga. S.Ct., Jan. 6, 1976); Berryhill v. State, 235 Ga. 549, ___ S.E.2d ___ (1975); Jarrell v. State, 234 Ga. 410, 216 S.E.2d 258 (1975); Chenault v. State, 234 Ga. 216, 215 S.E.2d 223 (1975); Mitchell v. State, 234 Ga. 160, 214 S.E.2d 900 (1975); Moore v. State, 233 Ga. 861, 213 S.E.2d 829 (1974); McCorquodale v. State, 233 Ga. 369, 211 S.E.2d 577 (1974); Ross v. State, 233 Ga. 361, 211 S.E.2d 356 (1974); Floyd v. State, 233 Ga. 280, 210 S.E.2d 810 (1974); Gregg v. State, 233 Ga. 117, 210 S.E.2d 659 (1974); House v. State, 232 Ga. 140, 205 S.E.2d 217 (1974).

Three men are under death sentence for committing rape in especially serious circumstances (violent recidivism or brutality). Coker v. State, 234 Ga. 555, 216 S.E.2d 782 (1975); Hooks v. State, 233 Ga. 149, 210 S.E.2d 668 (1974); Eberheart v. State, 232 Ga. 247, 206 S.E.2d 12 (1974). One death penalty for kidnapping, where the victim was murdered, also has been affirmed. Jarrell v. State, 234 Ga. 410, 216 S.E.2d 258 (1975). Death sentences for armed robbery have been imposed in several cases. However, armed robbery has effectively been eliminated from

the cases, in which a death sentence may be imposed, because the Supreme Court of Georgia, beginning with petitioner's own sentence review, has held that the rare imposition of death in Georgia armed robbery cases prevents its imposition in any more. Gregg v. State, 233 Ga. 117, 127, 210 S.E.2d 659 (1974); accord, Jarrell v. State, supra; Floyd v. State, 233 Ga. 280, 210 S.E.2d 810 (1974). 2/

2/ The remaining, decided cases are Brown v. State, 235 Ga. 644, ____ S.E.2d ____ (1975) (sentence hearing error); Barrow v. State, 235 Ga. 635, ____ S.E.2d ____ (1975) (improper instructions on confession); Banks v. State, 235 Ga. 121, ____ S.E.2d ____ (1975) (pre-trial discovery error); Tamplin v. State, 235 Ga. 20, rev'd on rehearing, 235 Ga. 774, ____ S.E.2d ____ (1975) (Witherspoon error); Stack v. State, 234 Ga. 19, 214 S.E.2d 514 (1975) (evidence error); Prevatte v. State, 233 Ga. 929, 214 Ga. 365 (1975) (argument error); Owens v. State, 233 Ga. 869, 214 S.E.2d 173 (1974) (Witherspoon error); Coley v. State, 231 Ga. 829, 204 S.E.2d 612 (1974) (death sentence disproportionate to similar rape case penalties); Atkins v. State, 231 Ga. 411, 202 S.E.2d 62 (1973) (1973 Act held not to apply to crime preceding effective date); Anderson v. State, No. 28527 (Ga. S.Ct., Apr. 8, 1974) (appeal dismissed as premature).

The capital defendant's guilt or innocence is determined in the traditional manner in the first phase of a bifurcated trial. Ga. Laws 1973, pp. 159, 162, [formerly Ga. Code Ann. § 27-2534, now substantially unchanged by Ga. Laws 1974, p. 352, Ga. Code Ann. § 27-2503 (Supp. 1975)] (not guilty pleas); Ga. Laws 1973, pp. 159, 171 [Ga. Code Ann. § 27-2528 (Supp. 1975)(guilty plea); App. A. at 4a, 6a, 7a]. This may be done by jury trial, bench trial, or guilty plea. Id. Whoever has made the determination of guilt also determines the sentence, and the basic procedure is the same in each instance. In the case of a bench trial or jury trial,

> "The court shall . . . conduct a pre-sentence hearing before the jury or judge at which time the only issue shall be the determination of punishment to be imposed. In such hearing, subject to the laws of evidence, the jury or judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any such prior criminal convictions and pleas; provided, however, that only such evidence and aggravation as the State has made known to the defendant prior to his trial, shall be admissible. The jury or judge shall also hear argument by the defendant or his counsel

> and the prosecuting attorney, as provided by law, regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument to the jury or judge. Upon the conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions and the jury shall retire to determine the punishment to be imposed. . . ." Ga. Laws 1973, pp. 159, 162, now substantially unchanged by Ga. Laws 1974, pp. 352, 357 [Ga. Code Ann. § 27-2534, superseded by § 27-2503 (Supp. 1975), App. A at 4a, 7a].

Evidence presented during the guilt or innocence phase of a bench or jury trial may be considered during the sentencing phase without the need to resubmit it. Eberheart v. State, 232 Ga. 247, 253, 206 S.E.2d 12 (1974). Essentially the same procedure is followed in the case of a guilty plea, with the judge considering the factual basis as well as evidence in aggravation and mitigation. See Mitchell v. State, 234 Ga. 160, 214 S.E.2d 900 (1975); Moore v. State, 233 Ga. 861, 864, 213 S.E.2d 829 (1974); Hooks v. State, 233 Ga. 149, 210 S.E.2d 668 (1974). "Mitigation" and "aggravation" are given their ordinary meanings (see T. 476), and the defendant is given wide leeway in presenting evidence.

See Brown v. State, 235 Ga. 644, 647-50, ____ S.E.2d ____ (1975).

The jury's verdict is not effective to impose death unless it affirmatively sentences the defendant to death. Ga. Laws 1973, pp. 159, 165, 170 [Ga. Code Ann. §§ 26-3102, 27-2534.1(c); App. A. at2a,11a]. The judge is bound by the jury's recommendation and if the jury cannot agree, the judge imposes a sentence less than death. Cf. Turner v. State, 235 Ga. 826, 830, ____ S.E.2d ____ (1976) (Decided under Ga. Laws 1973, pp. 159, 162, probably unchanged by Ga. Laws 1974, pp. 352, 357, though the language is less clear).

In most cases, before the death penalty may be considered after a finding of guilt, there is yet another pre-requisite. [For the instructions given in this case, see T. 475-76.]

In the cases of treason and aircraft hijacking, the General Assembly has found sufficiently grave implications in the commission of these crimes themselves to let guilt alone serve as the threshold for consideration of the death penalty. However, in the case of murder, armed robbery, rape, or either kidnapping, the General Assembly has determined to limit the death penalty consideration to those situations in which a "statutory aggravating circumstance" is present. Ga. Laws 1973, pp. 159, 165-170 [Ga. Code Ann. §§ 26-3102, 27-2534.1(c) (Supp. 1975) App. A at2a,11a]. The 1973 Act defines these statutory aggravating circumstances as follows:

"(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

"(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

"(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

"(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

"(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

"(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

"(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

"(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

"(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

"(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another."
Ga. Laws 1973, pp. 159, 164-65 [Ga. Code Ann. § 27-2534.1(c) (Supp. 1975) App. A at 11a].

If there is sufficient evidence to submit a statutory aggravating circumstance to the jury, the circumstance is defined in oral and written instructions, which go out with the jury. Not only must the jury affirmatively recommend death to make such a verdict effective, it also must indicate in writing, signed by the jury foreman, which aggravating circumstances it found. Ga. Laws 1973, pp. 159, 165 [Ga. Code Ann. § 27-2537(c) (Supp. 1975) App. A at 12a]. [The written instructions and verdict in this case are at R. 12, 15.] The trial judge has no discretion if the jury returns a verdict finding aggravating circumstances and imposing the death penalty; the trial judge must impose the death sentence. Ga. Laws 1973, pp. 159, 170, 171 [Ga. Code Ann. §§ 26-3102, 27-2514 (Supp. 1975) App. A at2a,29a]; Mason v. State, No. 30338 (Ga. S.Ct., Jan. 27, 1976) (T. 9). Although the prosecutor is not required to give notice of statutory aggravating circumstances whose proof occurs during the guilt or innocence phase of trial, cf. Hooks v. State, 233 Ga. 149, 150, 210 S.E.2d 668 (1974), petitioner did have such notice in this case. (R. 6).

There are several unifying themes within the statutory aggravating circumstances. Part of the themes are counterparts to the social implications already strongly inherent in treason against the State and hijacking of an airliner. Thus, these definitions are directed against violent recidivists and multiple offenders, Ga. Code Ann. § 27-2534.1(b)(1)(2); also, against those persons, who make death a group or commercial enterprise, Ga. Code Ann. § 27-2534.1(b)(4)(6); who threaten or kill in public groups or in immediate defiance of the public order, particularly its criminal justice system, Ga. Code Ann. § 27-2534.1(b)(3)(5)(8)(9)(10); or whose crimes are especially horrible and contemptible, e.g., in the use of torture. Ga. Code Ann. § 27-2534.1(b)(7). App. A. at 8a - 10a.

These crimes and circumstances, in other words, serve the purpose of expressing society's ultimate condemnation of the crime committed. Some serve the purpose of adding greater protection for public servants, who face greater risks of criminal attack on our behalf. And some serve to warn those more prone to commit such crimes: escapees, prisoners, and capital felons.

The most frequently applied statutory aggravating circumstance has been the commission "of murder, rape, armed robbery, or kidnapping . . . while the offender was engaged in the commission of another capital felony." Ga. Laws 1973, pp. 159, 164-65 [Ga. Code Ann. § 27-2534.1(b) (2) (Supp. 1975)]. Of these, the most common instance has been callous elimination of a witness to a

crime of greed or selfishness, usually armed robbery. Pulliam v. State, No. 30594 (Ga. S.Ct., Feb. 24, 1976); Goodwin v. State, No. 30587 (Ga. S.Ct., Feb. 24, 1976); Dobbs v. State, No. 30453 (Ga. S.Ct., Feb. 24, 1976); Berryhill v.State, 235 Ga. 549, ____ S.E.2d ____ (1975); Tamplin v. State, 235 Ga. 20, ____ S.E.2d ____, rev'd on reh., 235 Ga. 774, ____ S.E.2d ____ (1975); Jarrell v. State, 234 Ga. 410, 216 S.E.2d 258 (1975); Mitchell v. State, 234 Ga. 160, 214 S.E.2d 900 (1975); Prevatte v. State, 233 Ga. 929, 214 S.E.2d 365 (1975); Moore v. State, 233 Ga. 861, 213 S.E.2d 829 (1974); Floyd v. State, 233 Ga. 280, 210 S.E.2d 810 (1974); Gregg v. State, 233 Ga. 117, 210 S.E.2d 659 (1974); House v. State, 232 Ga. 140, 205 S.E.2d 217 (1974); Cf. Dobbs v. State, No. 30453 (Ga. S.Ct., Feb. 24, 1976); Ross v. State, 233 Ga. 361, 211 S.E.2d 356 (1974) (elimination of rescuing officer).

While not applied as frequently, the other statutory aggravating circumstances also have served already to control discretionary death penalty imposition in a rational, understandable way. Jury decisions and Supreme Court of Georgia review have added content to the statutory format.

Two cases illustrate the need seen by the General Assembly to warn violent recidivists not to continue their disrespect for the lives of others. In

the only death penalty case docketed under the 1973 Act, which can be described as involving a domestic or personal quarrel, Guy Mason shot his girlfriend in anger. Mason v. State, No. 30338 (Ga. S.Ct., Jan. 7, 1976). The aggravating circumstance -- and the key factor in comparative sentencing, -- was Mason's previous conviction for murder.

Similarly, Anthony Erlich Coker escaped from prison, raped a young mother three weeks after the birth of her child, and drove off with her and her car until officers caught up and rescued her. Coker v. State, 234 Ga. 555, 216 S.E.2d 782 (1975). Under such circumstances, as vicious as they were, he might have had grounds to argue that when the rescue prevented further harm to the woman, it also rendered the death penalty excessive. See Coley v. State, No. 28131, 231 Ga. 829, 204 S.E.2d 612 (1974). However, Anthony Erlich Coker had not just committed a minor capital felony before, he had both raped and murdered. Coker v. State, No. 29758, 234 Ga. 555, 216 S.E.2d 782 (1975) (transcript of pre-sentence hearing at p. 48 et seq.); Echols v. State, 231 Ga. 633, 634, 203 S.E.2d 165 (1974) (describing his participation in earlier rape-murder). In contrast, Jessie Lee Coley, supra, had crossed the threshold to death sentence liability under the recidivist circumstance by a relatively minor sentence of 19 years for armed robbery (T. 243; Report of the Trial Judge, second page), and the two cases together illustrate why the aggravating circumstances are pre-requisites, not death knells by themselves. See, p. 47 -56, infra.

When subjective elements occur in the definitions of the statutory aggravating circumstances, they are criteria whose occurrence is within the scope of common human understanding. In addition, while their factual determination is the responsibility of the judge or jurors, who set the sentence, the Supreme Court of Georgia must find legally sufficient evidence to support the determination on sentence review, and in this process the definitions are further refined. Ga. Laws 1973, p. 159, 166 [Ga. Code Ann. § 27-2537(c)(2)(Supp. 1975) App. A. at 12a].

For example, Marcus Wayne Chenault entered a church on Sunday morning and sprayed the congregation with pistol shots in an act of terrorism, killing Mrs. Martin Luther King, Sr., and another person. The Supreme Court of Georgia had no difficulty in affirming a jury's determination that Chenault had "knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person." Ga. Laws 1973, p. 159, 164 [Ga. Code Ann. § 27-2534.1(b)(3)(Supp. 1975)]. Chenault v. State, 234 Ga. 216, 216-217, 225-26, 215 S.E.2d 223 (1975). In contrast, the State argued in the case of David Jarrell that his kidnapping of Mala Still at pistol point in a shopping center parking lot, without more,

satisfied the same criterion. In holding that no evidence supported the determination, the Supreme Court lent credence to the proposition that the statutory aggravating circumstances are meant to be applied as confining agents, in a straightforward manner, and in consideration of their context as well as common understanding. Jarrell v. State, 234 Ga. 410, 410-12, 216 S.E.2d 258 (1975); see United States v. Crockett, 506 F.2d 759, 762 (5th Cir. 1975) (judge not required to further paraphrase terms reasonably within understanding of jury).

In a typical case, juries understand the concepts easily. As Amicus points out, anyone who commits a capital felony can be said to have a depraved mind. Brief for the NAACP, as Amicus Curiae, at 32. However, a jury has only to draw on its common human experience to understand the confining role and meaning the General Assembly intended when it authorized death for murders, rapes, kidnapping, and armed robbery, which are "outrageously or wantonly vile, horrible or inhuman in that [they] involved torture, depravity of mind, or an aggravating battery to the victims." Ga. Laws 1973, pp. 159, 165 [Ga. Code Ann. § 27-2534.1(b)(7) (Supp. 1975)].

For example, petitioner's own jury refused to make such a finding in this case (R. 12-18; T. 474-75, 479), but it was clear to all concerned, including the jury, that Timothy McCorquodale had committed such a crime. McCorquodale v. State, 233 Ga. 369, 211 S.E.2d 577 (1974) (murder preceded by horrifying torture).

Amicus contends also that "torture" in this same aggravating circumstance has "no perceptible boundaries" and cites Floyd v. State, 233 Ga. 280, 210 S.E.2d 810 (1974). Brief of N.A.A.C.P. as Amicus Curiae at n. 28, p. 33. Overlooked in this contention are the events which occurred in the William Lloyd Martin home in Atlanta when defendant Floyd and his cohorts arrived on December 12, 1973.

Floyd and his companions came to get money they believed to be in the home, but they did not stop at that. Young Ginger Martin, and apparently her mother also, were gagged by having thick socks stuffed into their mouths. At times, they were marched up and down stairs as if to harass them. They were subjected to the terror of being isolated from each other, and while they were apart, Mrs. Martin was told by defendant that he would cut off her daughter's fingers if Mrs. Martin did not tell him where the money was. The elimination murders were accomplished in a taunting manner. Defendant Floyd later laughed in recalling how Mrs. Martin put her hands up as if to hide from the pistol aimed at her,

and how, before he killed Ginger Martin, he bent over and kissed her. (T. 193, 201, 204-05, 245).

In affirming the determination that this aggravating circumstance was present, the Supreme Court of Georgia correctly declined to hold that the moments of terror in the Martin home were not torture and in doing so did not render the meaning of torture in any way imperceptible. Floyd v. State, 233 Ga. 280, 210 S.E.2d 810 (1974) (arguably dictum because armed robbery sentence vacated as disproportionate.

Aggravated battery is said to make the death penalty available in every murder because it occurs in every case and is authorized as a prerequisite in Ga. Code Ann. §§ 27-2537(b)(2) and (7). Brief for N.A.A.C.P. as Amicus Curiae, at 32, n. 26, citing Mitchell v. State, 234 Ga. 160, 214 S.E.2d 900 (1975). The decision cited illustrates the misunderstanding.

In Mitchell v. State, supra, the defendant held up a family grocery, murdered the 14-year-old son, and in two separate instances, shot the boy's mother in the back of her head and her body. The aggravated battery was to the mother; i.e., the district attorney was proceeding under current commission of an aggravated battery to another, Ga. Code Ann. § 27-2534.1 (b)(2) only, rather than to the victim. Ga. Code Ann. § 27-2534.1(b)(2) and (7); App. A at 9a, 10a.

See the transcript at p. 54-55; and the record at R. 8, 18. Mitchell v. State, supra; accord, Dobbs v. State, No. 30453 (Ga. S.Ct., Feb. 24, 1976).

If a prosecutor intends to rely on the concurrent commission of an aggravated battery to the victim, Ga. Code Ann. §§ 27-2534.1(b)(2)(7), it is probable, though not yet litigated, that he would need to prove a violation of Ga. Code § 26-1305 (aggravated battery) apart from the infliction of the murder wounds. The 1968 Criminal Code Committee Notes say that aggravated battery replaces the former crimes of mayhem, Ga. Code Chapter 26-12 (1933), under whose cases the intent to commit mayhem was specific. See, Swain v. State, 91 Ga. App. 561, 564, 86 S.E.2d 642 (1954)(holding verdicts inconsistent when for both mayhem and assault with intent to kill).

Although not applied in this way, an example of separate infliction of wounds constituting aggravated battery on the murder victim would be the ordeal of cuts, bites, and chemicals inflicted in McCorquodale v. State, 233 Ga. 369, 211 S.E.2d 577 (1974). McCorquodale also illustrates the fallacy in criticizing this aggravating circumstance because "it can make little difference to a dead man whether he can lift his right leg." Black, Punishment: The Inevitability of Caprice and Mistake 67 (1974), quoted in Brief

of N.A.A.C.P., as Amicus Curiae, at 32 n. 26. It can make a great deal of difference to the victim while he or she is alive that his or her body is being disfigured violently. 233 Ga. at 370-71.

It is just as misleading to suggest that a statutory aggravating circumstance is present in every rape on the premise that rape necessarily involves kidnapping with harm to the victim in virtually every case. Rape is "carnal knowledge of a female, forcibly and against her will." Ga. Code § 26-2001, App. A at 18a. Rape may occur without an "(abduction)" or "(stealing away)", a necessary element in any kidnapping. Ga. Code § 26-1311, App. A at 17a.

Amicus asserts that "no restriction remains available to limit the evident expansiveness of the words 'for the purpose of receiving . . . any . . . thing of monetary value.'" Brief of N.A.A.C.P. as Amicus Curiae at 31, n. 25, discussing Ga. Laws 1973, pp. 159, 164 (Ga. Code Ann. § 27-2534.1(b)(4). The oversight is in not acknowledging that criteria may overlap, yet still confine, and still have meaningful, mutually exclusive concerns.

Petitioner's case does illustrate a murder aggravated by armed robbery, Ga. Code Ann. § 27-2534.1(b)(2), and when this occurs there is also murder for monetary value. Ga. Code Ann. § 27-2534.1(b)(4); App. A at 9a.

Also, whenever a "nit man" carries out instructions to kill, he murders both for monetary value and at the direction of another. Ga. Code Ann. §§ 27-2534.1 (b)(4)(6). Cf. Smith v. State, No. 30205, Ga. S. Ct., Jan. 6, 1976 (couple killed her husband and girlfriend for insurance proceeds). However, the person who kills alone in order to receive a beneficiary's proceeds or legacy is within the fourth circumstance but not the second or sixth, and the person who has a partner to kill solely to resolve a love triangle enters the group defined only by the sixth circumstance and not the second or fourth.

In summary, the "statutory aggravating circumstances" do operate in a rational way to confine jury discretion to impose the death sentence. They limit the imposition to the most outrageous cases, along straightforward guidelines, and in doing so, they also implement sound legislative policy determinations.

C. Structuring of Discretion Continues at the Appellate Level.

The 1973 death penalty procedures provide "for automatic and swift appellate review." Coley v. State, 231 Ga. 829, 834, 204 S.E.2d 612 (1974). The review referred to actually is one of two aspects in appellate consideration of the death penalty case in Georgia. In every case there is an automatic review of the sentence itself. Ga. Laws 1973, p. 159, 165-66 [Ga. Code Ann. § 27-2537 (Supp. 1975), App. A at 11a]. In addition, each defendant may (and has) pursued a normal appeal in the traditional manner. Ga. Laws 1973, p. 159, 167 [Ga. Code Ann. § 27-2537(i) (Supp. 1975); App. A at 13.1a]. The appeal is for review of conventional error, and the sentence review requires the Supreme Court to determine whether the statutory imposition of the death penalty is unconstitutional as applied in each given case. E.g., Mitchell v. State, 234 Ga. 160, 162, 214 S.E.2d 900 (1975).

Thus, on sentence review, the Supreme Court is required to determine:

> "(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and
>
> (2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Code section 27-2534.1(b), and

"(3) Whether the sentence of death is excessive or disproportionate to the sentence imposed in similar cases, considering both the crime and the defendant." Ga. Laws 1973, pp. 159, 166 [Ga. Code Ann. § 27-2537(c)(1)(2)(3) (Supp. 1975), App. A at 12a].

Sentence review is expedited. When a death penalty is imposed, the trial judge, the clerk, and the court reporter are all instructed to give priority to the death case in moving it from judgment to the three-phase review by the Supreme Court. The reporter has to give the transcript "priority . . . over all other cases", and has to prepare it "at the earliest possible time". Ga. Laws 1973, pp. 159, 169 [Ga. Code Ann. § 27-2401 (Supp. 1975); App. A at 4a]. The judge must give priority to motions for new trial in death cases, and in contrast to the ordinary case, cannot extend the time for preparing and filing the transcript. Ga. Laws 1973, pp. 159, 168-69 [Ga. Code Ann. § 70-301 (Supp. 1975); App. A at 13.1a]. The trial court clerk must "transmit the entire record and transcript" to the Supreme Court within ten days after receiving the transcript. Ga. Laws 1973, pp. 159, 165-66 [Ga. Code Ann. § 27-2537(a) (Supp. 1975); App. A at 11a].

The trial court must include in the record the "trial judge's report", a supplemental characterization of the case for use of the Georgia Supreme Court in reviewing the sentence. Ga. Laws 1973, pp. 159, 166 [Ga. Code Ann. § 27-2537(a); App. A at11a]. The six and a half page questionnaire asks for personal information about the defendant and the case. [The trial judge's report in this case is in the record, and it is Appendix B to this Brief.

The report is served upon defense counsel, and it requires the trial judge to characterize the trial in several ways designed to test for arbitrariness and disproportionality. For example, there are six questions about whether race played a role in the case. In another question, the trial judge is required to say whether the evidence forecloses "all doubt respecting the defendant's guilt." In another question, he is required to comment on whether the sentence was appropriate. Seven questions concern the defendant's representation. See App. B.

The significance of the report is illustrated in the case of Stack v. State, 234 Ga. 19, 214 S.E.2d 514 (1975). From certain evidence at trial, the jury might have been able to infer that the defendant had flunked a lie detector test (evidence inadmissible under Georgia law). One reason for reversing conviction on this ground was the trial judge's indication in his report that the evidence in the

case did not foreclose all doubt. [This is question No. 11 in the trial judge's report. In this case see App. B at 4b. [3]

Each of the three review criteria has been a factor in appellate disapproval of trial level sentence imposition. Cases illustrating the review for sufficiency of the evidence for a finding of a statutory aggravating circumstance already have been discussed, supra, p.[27] . Ga. Laws 1973, pp. 159, 166 [Ga. Code Ann. § 27-2537(c)(2)(Supp. 1975); App. A at 12a]. Jarrell v. State, 234 Ga. 410, 424, 216 S.E.2d 258 (1975).

The structuring of discretion begun with the trial level determination of aggravating circumstances is continued in the other two phases -- sentence review for arbitrariness and sentence review for disproportionality. Ga. Laws 1973, pp. 159, 166 [Ga. Code Ann. § 27-2537 (c) (1) (3) (Supp. 1975); App. A at 12a]. There can be no doubt about the importance

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[3] In addition to Stack v. State, 234 Ga. 19, 214 S.E.2d 514 (1975), two other death penalty convictions have been reversed in full. Barrow v. State, 235 Ga. 635, ____ S.E.2d ____ (1975) and Banks v. State, 235 Ga. 121, ____ S.E.2d ____ (1975). Four death penalties, as opposed to convictions, have been reversed for conventional error. Brown v. State, 235 Ga. 644, ____ S.E.2d ____ (1975); Prevatte v. State, 233 Ga. 929, 214 S.E.2d 365 (1975); Owens v. State, 233 Ga. 869, 214 S.E.2d 173 (1974); Atkins v. State, 231 Ga. 411, 202 S.E.2d 62 (1973)(1973 death penalty procedures held inapplicable

of these two criteria in the General Assembly's retention of a narrowed, discretionary statute.

The Furman opinions, read as a whole, should not be read to invalidate the death penalty. Instead, they should be read as disapproval of the manner in which it was imposed in the country in general at that time. Discretion was not condemned; discrimination and arbitrariness were.

The General Assembly of Georgia has determined not to eliminate the authority of a judge and a jury to tailormake the punishment to an individual in each given case. In authorizing juries and judges to apply their own community values and first-hand understanding of all the facts in a given case, the General Assembly has reiterated policies acknowledged by the Court in Witherspoon v. Illinois, 391 U.S. 510 (1968); and McGautha v. California, 402 U.S. 183 (1971).

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[3] / fn continued

to crimes committed prior to effective date of 1973 Act although trial held afterwards).

The problem faced by the General Assembly in 1973 was how to continue to allow the defendant and society the benefit of the trial jury and trial judge's first-hand understanding, while at the same time to see that the discretion was not exercised arbitrarily or unfairly. The check is made through appellate sentence review i.e., by having the Supreme Court of Georgia decide in each individual case whether the record precludes an arbitrary or disproportionate imposition of sentence.

The concept of arbitrariness has a broad reach as a factor in sentence review. In each case, of course, the Supreme Court will give careful consideration to the record, the trial judge's report, and argument of counsel. But the arbitrariness criterion goes beyond looking at factual arbitrariness. For example, the criterion has been used explicitly to allow the court to reach around the normal procedural rule that error must have been preserved at the trial level. Owens v. State, 233 Ga. 869, 214 S.E.2d 173 (1974).

In Owens, supra, when a defendant under death sentence complained about the exclusion of prospective jurors, who expressed conscientious objection to capital punishment, the transcript of the voir dire was missing and could not be completed. The state moved to supplement the transcript, through the trial court, in accordance with regular appellate procedures. However, the Supreme Court

denied the motion and also refused to apply the usual rule that requires a party asserting error "to show it affirmatively by the record." 233 Ga. at 871. The death sentence was vacated and the case was remanded for a new trial on the sentencing phase only. The court held that "post-trial examination of lawyers and court officials, or of excluded veniremen, would not be a satisfactory means . . . to perform its review function" and gave as its rationale, in part, that it was required to determine "'whether the sentence of death was imposed under the influence of . . . any . . . arbitrary factor.'" 233 Ga. at 871, 72. See also Prevatte v. State, 233 Ga. 929, 930-32, 214 S.E.2d 365 (1975).

The first two criteria of sentence review, the search for arbitrariness and the presence of an aggravating circumstance, are meant to insure fairness within the context of the immediate case. The search for disproportionality in the sentence is meant to insure fairness when the case is compared to other, similar cases. Traditionally, the focus has been on the nature of the crime and, more recently, the nature of the criminal himself - the latter explored through pre-sentence investigations and bifurcated trials. See Ga. Laws 1974, pp. 352, 357 [Ga. Code Ann. § 27-2503 (Supp. 1975); App. A at 4a.] Now, there is concern, not limited to capital cases, with the interrelationships among sentences of different offenders, considering the defendant and his crime and other defendants and their crimes.

Compare, Ga. Laws 1973, p. 159, 166 [Ga Code Ann. § 27-2537(c)(3) (Supp. 1975)] (comparative sentencing, capital case) with Ga. Laws 1974, p. 352, 358 [Ga. Code Ann. § 27-2511.1 (Supp. 1975)] (comparative sentencing, other felony cases).

The 1973 Act gives the Supreme Court of Georgia the responsibility of determining "[w]hether the sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Ga. Code Ann. § 27-2537(c)(3); App. A at 12a. Each decision must announce the similar cases considered by the Court. Ga. Laws 1973, p. 159, 166 [Ga. Code Ann. § 27-2537(e)(Supp. 1975) App. at 13a. For purposes of obtaining cases for comparison, the Court,

> "shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate." Ga. Laws 1973, p. 159, 167 [Ga. Code Ann. § 27-2537(f) (Supp. 1975); App. A at 13a].

To assist the Georgia Supreme Court primarily in preparing extracts of these records, a new position is created on the staff of the Court:

> "There shall be an Assistant to the Supreme Court, who shall be an attorney appointed by the Chief Justice of Georgia and who shall serve at the pleasure of the court. . . . The Assistant shall provide the Court with whatever extracted information it desires with respect (to the records of the capital felony cases) including but not limited to a synopsis or brief of facts in the record concerning the crime and the defendant.
>
> "The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence.
>
> "The office of the Assistant shall be attached to the office of the Clerk of the Supreme Court of Georgia for administrative purposes." Ga. Laws 1959, pp. 159, 167 [Ga. Code Ann. § 27-2537(f)(g)(h) (Supp. 1975) App. A at 13a, 13.1a].

The court has announced that the cases initially considered for comparative sentencing include this pool of all Georgia Supreme Court records from January 1, 1970. Smith v. State, No. 30268 (Ga. S.Ct., Jan. 6, 1976); Jarrell v. State, 234 Ga.

410, 425, 216, S.E.2d 258 (1975). The Court's pool of cases for comparative sentencing in rape cases include at least one decision preceding January 1, 1970. Miller v. State, 224 Ga. 627, 163 S.E.2d 730 (1968), cited in Coker v. State, 234 Ga. 555, 216 S.E.2d 782 (1975); Hooks v. State, 233 Ga. 149, 210 S.E.2d 668 (1974); Eberheart v. State, 232 Ga. 247, 206 S.E.2d 12 (1974), and Coley v. State, 231 Ga. 829, 204 S.E.2d 612 (1974).

Provided that the other records are properly made a part of the record in a pending death penalty case, the Supreme Court will consider similar cases not brought before it earlier on their own appeal. See Moore v. State, 233 Ga. 861, 863, 213 S.E.2d 829 (1974); Ross v. State, 233 Ga. 361, 366, 211 S.E.2d 356 (1974).

However, the existence of one "similar" case in which a life sentence was imposed does not by itself mean that a death penalty defendant's sentence is "disproportionate". To the contrary, the Georgia Supreme Court has said:

> "As we view the court's duty in light of the Furman and Jackson cases and the statutory provisions designed by the Georgia legislature to meet the objections to those cases, this court is not required to determine that less than a death sentence was never imposed in a case with similar characteristics. On the contrary, we view it to be our duty under the

> similarity standard to assure that no death penalty is affirmed unless in similar cases throughout the state the death penalty has been imposed generally and not 'wantonly and freakishly' imposed. . . ." Moore v. State, 233 Ga. 861, 863-64, 213 S.E.2d 829 (1974).

Compare Coley v. State, 231 Ga. 829, 834, 204 S.E.2d 612 (1974):

> "The statute also requires comparative sentencing so that if the death penalty is only rarely imposed for an act or it is substantially out of line with sentences imposed for other acts, it will be set aside as excessive."

Petitioner Gregg complains that he is the victim of capricious sentencing. Yet the reported cases under the 1973 Act now clearly establish the proposition that he is a member of an abhorrent but nevertheless cohorent group. It is not at all unusual or freakish, and, in fact, frequently occurs,that a Georgia judge or jury imposes the death sentence, when a murder is committed in the course of an armed robbery or other capital felony for the purpose of callously eliminating witnesses. See Smith v. State, No. 30205 (Ga. S. Ct. Jan. 6, 1976) ("multiple murders"); Goodwin v. State, No. 30587 (Ga. S.Ct., Feb. 24, 1976)(murders committed in the course of another felony); Tamplin v. State, 235 Ga. 20, ____ S.E.2d ____

(1975)("witness to a robbery . . . killed or an attempt . . . made to kill such witnesses."), rev'd on other grounds, 235 Ga. 774, ____ S.E.2d ____ (1975); Jarrell v. State, 234 Ga. 410, 425, 216 S.E.2d 258 (1975)("murders wherein all of the witnesses were killed or an attempt was made to kill all of the witnesses"); Moore v. State, 233 Ga. 861, 865, 213 S.E.2d 829 (1974) ("murder of the victim of a robbery or burglary committed in the course of such robbery or burglary"); see also, Dobbs v. State, No. 30453 (Ga. S.Ct., Feb. 24, 1976); Goodwin v. State, No. 30587 (Ga. S.Ct., Feb. 24, 1976); Berryhill v. State, 235 Ga. 549, ____ S.E.2d ____ (1975); Mitchell v. State, 234 Ga. 160, 214 S.E.2d 900 (1975); Floyd v. State, 233 Ga. 280, 210 S.E.2d 810 (1974); House v. State, 232 Ga. 140, 205 S.E.2d 217 (1934).

Each of these decisions was affirmed after the Supreme Court had examined its records pursuant to Ga. Code Ann. § 27-2537(c)(3), App. A at 12a, and determined that in cases like petitioner's and those cited, the extreme sanction is not viewed by society as something to impose only rarely or freakishly.

The cases have arrived at the Georgia Supreme Court with regularity and in a coherrent pattern.

But the argument is made that in petitioner's case, and others, the similar cases selected for comparison include cases not prosecuted under the 1973 act. Thus, it is said, the arbitrariness condemned by Furman is carried forward. Brief for Petitioner at 31-32.

There are two answers to this. First, the cases decided under the new, post-Furman procedures show clearly that when the guidelines are in effect, a consistent pattern of death sentences results. Second, when the pre-Furman cases are considered for comparative sentences, their whole records are examined by the court, which now has the benefit of both the Furman and 1973 statutory guidelines. Ga. Laws 1973, pp. 159, 167 (Ga. Code Ann. § 27-2537(f); App. A. at 13a). In effect, then, the selected cases themselves receive "sentence review" before the comparisons are made. By definition in petitioner's case, the court was concerned with witness elimination murder in the course of another capital felony -- i.e., cases which complied with the second, aggravating circumstance. Ga. Laws 1973, pp. 159, 164 [Ga. Code Ann. § 27-2534.1(b)(2)(Supp. 1975); App. A at9a]. A jury would have

been authorized to consider the death sentences in these cases under the 1973 act, and the court can determine whether the case is too arbitrary to serve as a comparison.

It is also said that the pool of similar cases is skewed by the absence of cases which were plea bargained, or were not appealed, or were found to involve lesser crimes. Brief for Petitioner at 19-22, 30-31. The assumption should be that prosecutors plea bargain in cases of the least culpability and the least conclusive evidence of guilt. In other words, the plea bargained cases are not similar cases to be selected for comparison. [Since the sentence is determined separately and is reviewed separately on appeal, the prosecutor need not feel unduly increased pressure that a whole conviction will be reversed because it is a death case. The sentence can be overturned separately.]

The issue in a lesser-included offense situation is, first, whether there is reasonable doubt about the greater offenses, and then whether the defendant is guilty of the lesser crime. That is precisely what the instructions were in petitioner's case. (T. 431-32, 439). See generally, Bailey v. State, 153 Ga. 413(1), 112 S.E. 453 (1922); Kimball v. State, 63 Ga. App. 183(7)(8), 10 S.E.2d 240 (1940). The discretion in this instance is one of guided decision-making, not absolute whimsey.

Indeed, the same may be said of each of the benchmarks in the traditional criminal process identified by petitioner as sources of arbitrariness. Questions of intent, insanity, reasonable doubt, and the like are decided by means of terms within common understanding. These words control the results in a non-arbitrary way. Only by violating its oath can the trial court or jury step outside the guidelines historicaly developed to lead to one correct result in a given case.

Nor does it skew the sample that there will be convictions of capital crimes, from which no appeal is taken. The problem has not been that isolated members of a well-defined group escaped death. The problem has been that isolated members did not escape it. Under the sentence review procedures of the Supreme Court of Georgia, as prescribed by the 1973 Act, each sentence is affirmed if, and only if, it can be demonstrated from records available to the Court that the sentence is frequently imposed in similar cases.

The death penalty is rarely imposed for any armed robbery, the Georgia Supreme Court has concluded from its examinations of the armed robbery records before it. Gregg v. State, 233 Ga. 117, 127, 210 S.E.2d 669 (1974). There is a message in this result for a person like petitioner, who selfishly commits a crime of greed,

such as armed robbery. In committing the crime he faces a dilemma. Harming the witness increases his culpability, but leaving the witnesses alone increases his chance of being caught.

The answer is not to commit the armed robbery at all, but petitioner and others unfortunately have not accepted that answer. In response, those who set sentences not infrequently reply that felons should at least have let their victims live, or rue the day.

Thus, the death penalty procedures passed in 1973 by the Georgia General Assembly serve several functions. They confine trial courts to considerations of the death penalty only in the most abhorred circumstances. They require careful appellate review of each sentence to insure its constitutionality. The sentence must be in an authorized category; it cannot be arbitrary; and it cannot be disproportionate to the punishments imposed in similar cases upon similar defendants. As implemented, the act has been accomplishing its goals and also has served to warn persons like petitioner that punishment of death will consistently be applied to those who take the lives of others in callous, selfish ways.

II.

The petitioner and the N.A.A.C.P., as Amicus Curiae, have attacked both the prosecutorial phase and the clemency phase of the Georgia criminal justice system as it relates to the administration of the death penalty. The attack is broad, sweeping, and replete with generalities. This portion of respondent's brief will address the various allegations directed against the prosecutor and the clemency aspect of the criminal justice system.

A. The Prosecutor -

At the outset, it should be noted that the tone of the argument used by petitioner and the N.A.A.C.P., Amicus Curiae, is set by a quote, in the Brief of the N.A.A.C.P., of dictum from an 1897 decision of the Supreme Court of Georgia. 4 / The dictum quoted states that the entire proceeding, from the time the case comes to him until the verdict, is under the direction, supervision and control of the district attorney. One wonders what happened to the trial judge and to defense counsel. For such an assertion to be advanced on behalf of petitioner and as an accurate picture of the prosecutor in Georgia is incredible.

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4 / Brief of N.A.A.C.P., as Amicus Curiae at 54.

Rather than controlling the "whole proceeding" the district attorney in Georgia is charged with controlling the State's side of the case. His duties are clearly set out by statute and are principally set out in Appendix A to this Brief. App. A at 20a. They include the duty to draw up all indictments or presentments, when requested by the grand jury, and to prosecute all indictable offenses. Ga. Code Ann. § 24-2908(4); App. A. at 22a. The district attorney has authority, on the terms prescribed by law, to enter a nolle prosequi on indictments. Ga. Code § 24-2915; App. A. at 23a. If it is before the case is submitted to the jury, consent of the court must be obtained, and, if after the case has been submitted to the jury, the consent of the defendant. Ga. Code § 27-1801; App. A. at 24a.

Attention should be given to the oath the district attorney makes upon entering office:

> "I do swear that I will faithfully and impartially, and without fear, favor, or affection, discharge my duties as district attorney, and will take only my lawful fees of office. So help me God." Ga. Code § 24-2902; App. A at 26a.

Also to be considered is the Code of Professional Responsibility, Ethical Consideration - EC 7-13 (1973 Rev.), App. A. at 21a which provides in part, that:

> "His duty is to seek justice, not merely to convict . . . (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute. . .; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. . . ."

This Ethical Consideration is fully applicable to district attorneys in Georgia. See Appendix to Title 9, Ga. Code Ann., Rule 3-107.

Obviously, the role of the prosecutor is one where a large degree of discretion is employed. However, there should be a presumption that the exercise of that discretion is like that of a judge and implies "conscientious judgment, not arbitrary action." See, State v. Shiren, 9 N.J. 445, 452, 88 A.2d 601 (1952). For the district attorney in Georgia who abuses his office, in addition to facing the electorate and the State Bar, he must contend with Ga. Code Ann. § 40-1617 which sets forth the particulars concerning the prosecution of a district attorney for misfeasance or malfeasance in office.

The case, Cargile v. State, 194 Ga. 20, 20 S.E.2d 416 (1942), states that the offense is "the wrongful or unjust doing of an act which the doer has no right to do, or failure to do what the law makes it his duty to do with evil intent or motive or due to culpable neglect." For an example of a recent prosecution of a district attorney in Georgia, see, Reynolds v. State, 132 Ga. App. 89, 207 S.E.2d 630 (1974).

Against the district attorney's oath, ethical directions and presumption that he is not performing his duties improperly or arbitrarily, what does the petitioner present to show arbitrariness? Only the bald assertion, based on a statement obtained from an assistant district attorney in another state in another region of the country, contained in a law review, that capital cases are particularly likely to be settled by plea bargaining because of the amount of time they consume in preparation and trial. 5 /

Can the same be said for prosecutors in Georgia? I think not. It has been this writer's observation that those cases in which the district attorney would seek the death penalty are no more

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5 / Petitioner's Brief at p. 19

likely for plea bargaining than any other case. But certainly a finding of arbitrariness cannot rest on bald assertions nor upon observations.

The petitioner uses the case Caldwell v. Paige, 230 Ga. 456, 197 S.E.2d 692 (1973), as an example of a plea bargain in a capital case. There the defendant committed the crime of rape in 1962; he was convicted and sentenced to death. The Supreme Court of Georgia affirmed. Paige v. State, 219 Ga. 569, 134 S.E.2d 793 (1964). In a habeas corpus action the Fifth Circuit reversed, requiring a new trial, Paige v. Potts, 354 F.2d 212 (5th Cir. 1965). In 1966 the district attorney accepted a plea of guilty and defendant was sentenced to life imprisonment. The petitioner does not inform us whether the prosecutrix was available for the second trial, nor as to the presence or absence of any other vital witness nor any other non-arbitrary factor which may have weighed in the district attorney's decision to accept a guilty plea some four years after the crime was committed. Instead, we are to assume that the district attorney acted arbitrarily.

Other than generalities and self-serving conclusions which do not merit serious consideration, e.g., the assertion that Georgia law provides no guidance or oversight to insure against arbitrariness

of district attorneys, 6/ as we have seen such guidance is afforded, the petitioner presents nothing to the Court upon which a conclusion could be drawn that any district attorney has acted arbitrarily in any case in Georgia. Conversely, the scantiness and lack of specific instances of arbitrariness in the arguments submitted in behalf of petitioner appear to indicate the soundness of the prosecutor in Georgia.

6/ Brief of N.A.A.C.P. as Amicus Curiae at 57.

B. Executive Clemency -

The briefs written on behalf of petitioner describe the role of executive clemency in Georgia as a "final lottery" 7/ "an absolute discretion" 8/ "is not and cannot be constrained by any bounds or principles of regularity" 9/ and "freakish mercy". 10/

Apparently, petitioner should be informed as to the policy of the State Board of Pardons and Paroles as set forth at pages 23, 24 of their Policies, Rules, and Regulations (1971). The policy requires that an application for the commutation of a death sentence must contain the grounds of the requested commutation in writing. Further, the policy requires that:

> "All persons sentenced to death will have their cases reviewed and decided by the Board, either upon the request of the condemned inmate, anyone in his behalf, or

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7/ Brief of N.A.A.C.P. as Amicus Curiae, at 65.

8/ Id. at 65.

9/ Id. at 66

10/ Petitioner's Brief at 34.

upon the Board's motion. The right will not be denied for lack of funds, friends, or means with which to have the case reviewed by this Board."

The policy also provides that the Board shall conduct a thorough investigation of each case including the background of the defendant, the circumstances of the offense, the conduct of the trial, a detailed study of the appellate record and extensive interviews with all persons whose knowledge might shed light on the case. Further, the policy states that among other specified guides in reviewing an application for commutation "(b) The Board respects the sentences of the Courts but will consider evidence or other facts showing extenuating circumstances or justification for commission of the crime."

In Georgia the State Board of Pardons and Paroles may act on the commutation of a death penalty only when the Governor has suspended said penalty. Constitution of Georgia, Ga. Code Ann. § 2-3011; Ga. Code Ann. § 77-511. App. A. at 38a. In addition, any such action must be reported to the General Assembly at its next regular session. Constitution of Georgia, Ga. Code Ann. § 2-3011; App. A at 35a. Thus, action

by the executive branch of State government in commuting a death sentence requires affirmative action by the Governor, a majority of the State Board of Pardons and Paroles, with an overview by the State legislature. In addition, for any abuse of his duties, a member of the Board may be removed for cause by unanimous vote of the Governor, Lt. Governor, and Attorney General. Constitution of Georgia, Ga. Code Ann. § 2-3011. Therefore, actions in the area of executive clemency are well regulated.

Again, it must be noted that the petitioner has not demonstrated any specific irregularity or arbitrariness in the area of executive clemency nor has he attempted to demonstrate such.

III.

THE DEATH PENALTY IS NOT PER SE CRUEL AND UNUSUAL PUNISHMENT CONDEMNED BY THE EIGHTH OR FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. The Standard of Review -

As the petitioner has appropriately noted 11/ the proper review by the Court in this case was enunciated by the Court in Weems v. United States, 217 U.S. 349, 378-379 (1910), when the Court held, in defining its role vis-a-vis a State legislature in providing punishments for crimes that:

> "However, there is a certain subordination of the judiciary to the legislature. The function of the legislature is primary, its exercise fortified by presumption of right and legality, and is not to be interferred with lightly, nor by any judicial conception of its wisdom or propriety. They have no limitations, we repeat, but constitutional ones, and what those are the judiciary must judge."

11/ Brief of petitioner in Fowler v. N.C., pp. 105, 106, incorporated by reference of petitioner.

The Court disclaimed the right to assert a judgment against a legislature as to the expedience of its law.

Thus, the action of the General Assembly of Georgia, under review in this case, carries with it a "presumption of right and legality."

The Amendment to the United States Constitution basicly involved in the present case is, of course, the Eighth Amendment. This Amendment by its nature suggests a more prominent role for the State legislature than any other Amendment to the Constitution. It is doubtful if anyone would seriously argue that the legislature is not presumed to embody the basic standards of decency prevailing in the society. Such must be presumed in a democracy. And, indeed, the petitioner has presented nothing that would suggest that the General Assembly of Georgia has lost touch with the current social values of the citizens of this State. To invalidate Georgia's legislative enactments providing for a death penalty would have this Court encroaching upon an area squarely within the historic prerogative of the legislative branch, i.e., its duty to protect its citizens through the designation of penalties for prohibitable conduct. Weems, supra.

The basic principle of review enunciated in Weems, supra, was reiterated in Trop v. Dulles, 356 U.S. 86, 103 (1958):

> "Courts must not consider the wisdom of statutes but neither can they sanction as being merely unwise that which the Constitution forbids."

And more recently in McGautha v. California, 402 U.S. 183, 195 (1971):

> "Our function is not to impose on the States, ex cathedra, what might seem to us a better system for dealing with capital cases. Rather it is to decide whether the Federal Constitution proscribes the present procedures of these two States in such cases."

In the instant case, the petitioner has not only failed to show that the traditional penalty, the death penalty, is unconstitutional but even that it is unwise.

It may be noted that the petitioner urges upon this Court a "uniquely stringent standard of judicial review" under "the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, supra, 356 U.S. at 101. It should also be noted that the case from which he lifts his standard unambiguously rejects his arguments, Trop v. Dulles, supra, 356 U.S. at 99.

Additionally, the petitioner urges that in this case the ordinary deference due to legislative judgment should be ignored because the imposition of a death sentence is fundamentally contrary to the basic values of our society. It would be interesting to determine how petitioner arrived at such a conclusion since as we have already seen the legislature is more likely to reflect the basic standards of decency prevailing in our society. The petitioner appears to be posturing that he is in better communication with society than the elected representatives of that society. The error in such a posture is apparent on its face. Since Furman v. Georgia, supra, 35 state legislatures have enacted statutes providing for the death penalty.

The petitioner is unable to mount any viable argument against the standard for review as enunciated in Weems v. United States, supra, 217 U.S. at 378, 379, that the judgment of the legislature is fortified by presumptions of right and legality and is not to be interfered with lightly when reviewed in connection with the Eighth Amendment. Conversely to the position taken by the petitioner, when reviewed in connection with the Eighth Amendment, which involves contemporary standards of social values, the legislative judgment takes on added dignity because of the likelihood that such a judgment more accurately reflects community values and standards.

It is clear that what the petitioner seeks is that this Court hold constitutionally impermissible a punishment clearly permissible under the Constitution at the time of its adoption and accepted as such by every member of the Court until Furman v. Georgia, supra. 12 / One must ask what has happened so suddenly as to cause the particular punishment to become so cruel as to become unconstitutional under the Eighth Amendment. The petitioner asks for the absolute prohibition of capital punishment for any crime, regardless of its depravity or impact on society.

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12 / Furman v. Georgia, 408 U.S. at 381 (dissenting opinion of Mr. Chief Justice Burger).

B. The Legislature in Enacting a Death Penalty Statute Determined that Such a Penalty was not Excessive And is Justified Under Certain Conditions.

In light of the arguments of petitioner that the capital punishment is an excessive punishment which serves no penal or social purpose, it becomes necessary to inquire into the reasons and justifications of state legislatures in thrity five states for restoring capital punishment as an available punishment after this Court's decision in Furman v. Georgia, supra.

(1) The petitioner is seeking to have this Court declare a statute of the State of Georgia unconstitutional for the reason, they state, that capital punishment serves no useful purpose and specifically that capital punishment is not a deterrent to crime. Upon what does the petitioner base his conclusion that capital punishment is not a deterrent? Apparently, upon various studies of crime rates of states with capital punishment as opposed to those states without such punishment and similar studies. The conclusions of such studies, that capital punishment is not a deterrent, is explained by the petitioner with the proposition that people who commit such violent crimes as would qualify them for capital punishment are

irrational people who do not respond as rational people would expect. Such an argument begs the question. While it is somewhat true that neither petitioner nor respondent can present to the Court real proof that capital punishment does or does not act as a deterrent to crime, several observations concerning the deterrent aspect of capital punishment should be made. This Court has long accepted the fact that capital punishment serves as a deterrent. In Trop v. Dulles, supra, 356 U.S. at 111, Mr. Justice Brennan in a concurring opinion stated:

> "Of course, rehabilitation is but one of the several purposes of the penal law. Among other purposes are deterrents of the wrongful act by the threat of punishment and the insulation of society from dangerous individuals by imprisonment or execution."

See also, Weems v. United States, supra, 217 U.S. at 381.

How can it possibly be said that the death penalty does not act to deter would-be crime perpetrators from carrying out their schemes? In Powell v. Texas, 392 U.S. 514, 531 (1968), the Court presumed that the very existence of criminal sanctions

serves to reinforce condemnation of murder, rape and other anti-social conduct. It cannot, on the other hand, be presumed that the threat of death has not stayed the hand and saved the life, simply because the penalty has failed to deter those who commit capital felonies. Statistics probably could never be gathered to positively prove how many capital crimes were averted by the existence of the death penalty, for no census gatherer or poll-taker could persuade even one person to admit that he would have committed a murder but for the knowledge that he might have received the death penalty. It is in the very nature of man to recoil the most strenuously from forfeiture of his life. Although this deterrent effect cannot for lack of knowledge be measured conclusively in terms of the numbers of capital crimes not committed, other indications of the prevailing belief in the superior deterrent effect of the death penalty are recitable.

It may be noted that the legislatures which have abolished capital punishment for some crimes have retained it for certain other crimes, notably for murder committed by certain prisoners and for the murder of law enforcement officers and certain persons in prison. What primary purpose could these carefully selected exceptions have other than deterrence? Certainly the exceptions do not bear witness to a greater value being placed on some victims' lives than on others. There can be

no real doubt that it was a policy determination by the legislatures in those states that the death penalty is a deterrent. It has recently been pointed out that in the years since the Six Day War in the Middle East many Arab terrorists have been incarcerated in Israeli prisons. 13/ The terrorists, serving long term prison sentences and knowing that Israel does not have the death penalty and knowing nothing they will do will bring about a more serious punishment than the years in prison they already face, have murdered their cell mates and admitted the act showing the wardens the instruments they used. 14/ Additionally, the threat of the death penalty for armed robbery palpably has served as a deterrent; it is common knowledge that robbers frequently accomplish their ends with unloaded weapons. Can it be said that this is not because they were aware that an armed robbery could draw the death penalty but an unarmed robbery could not. 15/ Equally, it may be argued

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13/ Leiser, Burton M., LIBERTY, JUSTICE, AND MORALS, (New York: MacMillan Pub. Co., 1973), p. 222.

14/ Jerusalem Post, p. 8, July 9, 1974

15/ Criminal Code of Georgia §§ 26-1901, 26-1902; App. A at 18a.

that the dramatic upswing 16/ in the number of murders committed during the commission of an armed robbery (the witness elimination murder) has been, to some degree, caused by the general belief in the criminal community, following the Court's decision in Furman v.Georgia, supra, that the death penalty had been overturned.

The petitioner, as we previously noted, argues that all those who commit capital crimes are irrational and therefore are not deterred by any punishment. However, the more reasonable view is that except for the insane (not punishable) and those fanatics who would welcome martyrdom, men generally weigh the costs or risks of the acts they contemplate. When the risk or the cost of an act is too high, men usually do not do it.

Even the Royal Commission found that there was some evidence to support the conclusion that the penalty of death is likely to have a stronger effect as a deterrent than any other form of punishment. 17/

16/ Unpublished computer print-out Georgia Department of Offender Rehabilitation, March 12, 1976.

17/ Report of Royal Commission on Capital Punishment, 1949-1953, § 68, at 24.

If human life is sacred (on this petitioner and respondent would probably agree) and if the threat of capital punishment deters some murders, then capital punishment should be retained. At the cost of some lives, more may be saved - the lives of those who would have been the victims of murderous assaults and the lives or liberties of those who have been deterred. If there is a genuine reverence for human life, there must at least be as much concern for the lives of those who are the innocent victims of capital crimes as for those who have been convicted of a capital crime. The assailant is often seen as an object of pity, as a victim of circumstance beyond his control. However, pity for the defendant should not be permitted to misguide us into disregard for his victims and future victims. The Supreme Court of Georgia noted long ago in Eberhart v. Georgia, 47 Ga. 598, 610 (1873), [18] that:

> "We have, however, no sympathy with that sickly sentimentality that springs into action whenever a criminal is at length about to suffer for crime. It may be a sign of a tender heart, but it is also a sign of one not under proper regulation. Society demands that crime shall be punished and criminals warned, and the false

[18] Case is not reported in a regional reporter.

> humanity that starts and shudders when the axe of justice is ready to strike, is a dangerous element for the peace of society. We have had too much of this mercy. It is not true mercy. It only looks to the criminal, but we must insist upon mercy to society, upon justice to the poor woman whose blood cries out against her murderers. That criminals go unpunished is a disgrace to our civilization, and we have reaped the fruits of it in the frequency in which bloody deeds occur."

Petitioner's brief, by incorporation, is replete with partial statistics, assertions of unconfrontable "experts", and all types of "objective indicators" which allow not of cross-examination and which are not subject to the rules of evidence. It is submitted that the standards intended by the statement that "the [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society" [19] are standards of fundamental significance not capable of measurement by a judicial tribunal confined to the evidence in the record of a case and ill-equipped for wide-ranging factual investigation or the gathering of conflicting evidence. The scope and magnitude of the "evidence" offered by petitioner itself bespeaks an attempt that would more fittingly be directed to a legislature.

[19] 356 U.S. at 101.

The petitioner in this case has presented no convincing evidence that capital punishment does not in fact deter or prevent the commission of at least some capital crimes. One should bear in mind that petitioner's burden is to establish the unconstitutionality claimed. As reemphasized by the Court in McGautha v. California, supra, 408 U.S. at 451, a heavy burden rests on those who attack the legislature's judgments to prove the lack of rational justification. It is a rule of long standing that legislative decisions which fall within the special competency of that branch are entitled to a presumption of validity. Trop v. Dulles, supra, 356 U.S. at 103; Louisiana ex rel. Francis v. Resweber, supra, 329 U.S. 459 (1947); Weems v. United States, supra, 217 U.S. at 378-379; In re Kemmler, 136 U.S. 436, 449 (1890).

(2) Although recognizing that one member of the Court has branded retribution as having been roundly condemned as an intolerable aspiration for a government in a free society, [20] it is incumbent upon respondent to address the concept of retribution. It may also be noted that Mr. Justice Stewart in a concurring opinion, Furman v. Georgia, supra, 408 U.S. at 308, stated that:

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[20] 408 U.S. at 343.

> "I cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment. The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law."

And as Mr. Justice Powell noted in a dissenting opinion, Furman v. Georgia, supra, 408 U.S. at 452, the Court has long acknowledged the existence of retribution as an element in criminal sanctions and has never before been found impermissible. In Williams v. New York, 337 U.S. 241 (1949), the Court affirmed a death sentence imposed in a New York state court by a trial judge when one of the reasons given by the judge for the sentence was his revulsion at the "shocking details of the crime." Id., at 244.

Contrary to what the petitioner would have us accept, there is a widespread view that justice requires that no man should be allowed to gain by his misdeeds; that an individual who commits a crime should "pay his debt to society," regardless of whether he is reformed by having to do so and regardless of the deterrent effects

such payment may have on others. Such a view has deep roots in history. 21/ This concept, so deeply rooted in our past, has to a degree come to us in the present and thus should be understood. Mr. Justice Marshall in his concurring opinion in Furman v. Georgia, supra, 408 U.S. at 343, noted that, "Punishment as retribution has been condemned by scholars for centuries". However, Immanuel Kant, the 19th Century philosopher should not be completely ignored. Kant has stated:

> "Judicial punishment can never be used as a means to promote some other good for the criminal himself or for civil society, but instead it must

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21/ See, Leiser, LIBERTY, JUSTICE AND MORALS, supra, at 200, citing Numbers 32: 33, where God commands the children of Israel by saying, "You must not defile the land in which you reside, but blood defiles the earth; and there is no way to cleanse the earth of the blood that has been spilled upon it but by the blood of him who has spilled it."

> in all cases be imposed on him only on the ground that he has committed a crime;" 22/

While Kant's view may represent the other extreme, certainly it may not be said that retribution is no longer a legitimate reason for punishment and thus constitutionally impermissible. 23/

22/ Murphy, Jeffrie G., KANT, THE PHILOSOPHY OF RIGHT (London, MacMillan and Co. Ltd., 1970), p. 140.

23/ As to current attitudes on retribution one need only look at the March, 1976, issue of TRIAL magazine, published by The Association of Trial Lawyers of America. Stephen A. Bennett in an article "Rehabilitation in Check", states:

"The debate over the merits of prisons and punishments has reached a new high pitch, and the forces in favor of retribution appear to be winning. Within the last five years, the idea that prisons are meant primarily to rehabilitate has been subjected, to lethal bombardments. Today the 'rehabilitation ideal' lies sprawled on its deathbed.

(Fn. continued on next page)

It is submitted that retribution is a vital part of mankind's concept of justice. It is difficult for people

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(fn. continued)

"This new thrust has emerged with sudden swiftness. Little more than five years ago you could hear prison administrators everywhere enthusiastically talk of rehabilitation as their chief goal. Listening to them talk, one would have regarded today's thinking as heretical, not to mention barbaric. Retribution in place of rehabilitation? To some, even the word sounds cruel and unusual. In truth, however, retribution always has been a real, if not always acknowledged, function of prisons. A growing number of authorities and decision-makers are calling for the recognition of that fact. And they make no apologies."

to understand that in our "system of criminal justice" the victim should be compelled to suffer more than the attacker. [24]

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[24] Leiser, LIBERTY, JUSTICE AND MORALS, supra, at 202 quotes from Edmond N. Cahn, THE SENSE OF INJUSTICE: AN ANTHROPOMORPHIC VIEW OF LAW (New York: New York University Press, 1949), p. 12, as follows:

"The evolutionary connectedness of human life and of man's relations is the root fact of law . . . Justice, as many attempted definitions have rather clearly demonstrated, is unwilling to be captured in a formula. Nevertheless, it somehow remains a word of magic evocations. . . . Perhaps the human mind does contain self-evident truths concerning justice, from which legal norms less obvious in their nature may be deduced."

In Furman v. Georgia, supra, 408 U.S. at 414, Mr. Justice Blackmun in a dissenting opinion stated:

> "Nevertheless, these cases are here because offenses to innocent victims were perpetrated. This fact, and the terror that occasioned it, and the fear that stalks the streets of many of our cities today perhaps deserve not to be entirely overlooked. Let us hope that, with the Court's decision, the terror imposed will be forgotten by those upon whom it was visited, and that our society will reap the hoped-for benefits of magnanimity."

From the response of the state legislators echoing the will of the people, it is obvious that the terror has not been forgotten. 25/

How does the petitioner confront the concept of retribution? By the bold and singular assertion that, "With these constitutional limitations, it cannot

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25/ As has been previously pointed out in this brief, 35 states have responded to the Court's decision in Furman v. Georgia, supra, by enacting new statutes providing for capital punishment.

be asserted that any particular penalty is more supportable by a retributive purpose than any other penalty." 26/ The people of Georgia do not agree. 27/

26/ Brief of Petitioner in Fowler v. N. C., p. 127, incorporated by reference of petitioner.

27/ Ga. Laws 1973, p. 159.

C. The Georgia Jury's Imposition of the Death Penalty is in a Non-Arbitrary and Non-Capricious Manner.

As the Court is no doubt aware many have read the concurring opinions in Furman v. Georgia, supra, as an attack upon the American jury system, certainly in capital cases at least. The jury's exercise of its discretion was branded as arbitrary and capricious. 28/ The informed selectivity employed by the jury was discounted. 29/ These views and allegations were startling, particularly so in light of the Court's recent decision in McGautha v. California, 402 U.S. 183 (1971). In McGautha v. California, supra, 402 U.S. at 202, the Court relied heavily upon Witherspoon v. Illinois, 391 U.S. 510 (1968), and quoted from that decision as follows:

> "[Juries] do little more - and must do nothing less - than express the conscience of the community on the ultimate question of life or death."

28/ 408 U.S. at 295, 310, 314.

29/ 408 U.S. at 293, 294.

The Court quoted further:

> "One of the most important functions any jury can perform in making such a selection is to maintain a link between contemporary community values and the penal system - a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'"

Of course, McGautha went on to hold that the absence of standards to guide a jury's discretion in determining whether to impose or withhold the death penalty did not violate the due process clause of the Fourteenth Amendment.

Traditionally, as Mr. Chief Justice Burger noted in his dissenting opinion in Furman v. Georgia, supra, 30/ the selectivity of juries in imposing capital punishment has been viewed as a refinement on, rather than a repudiation of, the statutory authorization for the death penalty. The Chief Justice also notes that there are many factors which a jury quite properly should consider before imposing a sentence of death. Such factors should include among others the motive or lack of motive of the perpetrator, the degree of injury or suffering of the victim or victims and the degree of brutality involved in the crime. The determination

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30/ 408 U.S. at 388

of such factors appears to be one for which the jury is uniquely suited. McGautha v. California, supra, 402 U.S. at 205, quoting the Royal Commission on Capital Punishment, 1949-1953, Cnd. 8932, § 553(b), stated:

> "No formula is possible that would provide a reasonable criterion for the infinite variety of circumstances that may affect the gravity of the crime of murder. Discretionary judgment on the facts of each case is the only way in which they can be equitably distinguished."

And again quoting McGautha v. California, supra, 402 U.S. at 208:

> "For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of cricumstances would ever be really complete. The infinite variety of cases and facets to each case would make general standards either meaningless 'boiler-plate' or a statement of the obvious that no jury would need."

As Mr. Chief Justice Burger has noted, 31 / it is remarkable that with this Nation's basic trust in lay jurors as the keystone in our system of criminal justice that the most

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31 / 408 U.S. at 402.

sensitive and important of all decisions should be taken away from them. And as aptly stated by the Court in Reid v. Covert, 354 U.S. 1, 10 (1957):

> "Trial by jury in a court of law and in accordance with traditional modes of procedure . . . has served and remains one of our most vital barriers to governmental arbitrariness. These elemental procedural safeguards were embedded in our Constitution to secure their inviolateness and sanctity against the passing demands of expediency or conveniences."

Alexis de Tocqueville writing in Democracy in America, p. 282, stated:

> "The institution of the jury . . . places the real direction of society in the hands of the governed . . . and not in that of the government. . . . He who punishes the criminal is . . . the real master of society. . . ."

The few specific allegations of arbitrariness made by petitioner in this case concerning Georgia juries have been refuted in Part I of this brief and will not be gone into further here.

Petitioner has alleged in his brief by incorporation of other briefs, 32 /

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32 / Brief of Petitioner in Fowler v. N. C., pp. 130, 131, incorporated by reference of petitioner

the contention that the public has repudiated capital punishment and attempts to support the contention by arguing that because all of those who are convicted of crimes for which the law authorizes a capital sentence as the maximum sentence do not receive that maximum.

Petitioner urges that if capital punishment were uniformly applied to all persons liable to it, it would be unacceptable to "the people." Such an argument would undoubtedly render all maximum penalties unconstitutional, because while it is true that contemporary society would probably not accept the imposition of current maximum penalties for every offender for murder or rape, the same is true for any other crime (such as 20 years for every burglary and every burglar, 10 years for every aggravated assault, 10 years for every first degree forgery and every such forger).

The argument is nothing more than a demand that we revert to a system of mandatory penalties fixed for narrowly-categorized crimes so that regardless of mitigating circumstances or the personal history of the defendant, the death penalty (or any other penalty for that matter) would be automatic once guilt was determined. It is difficult to see how such a wooden approach would be constitutionally mandated, particularly when the discretion of the jury has been regarded as the intervention of the voice

of society against which the crime was committed. The jurors do not represent the community in the sense that they are elected to convey the community's collective sentiments and to be its spokesmen. The jurors instead represent the community in the sense that they come from it and therefore sit as a parcel of it, though partitioned from it. The jury is not the State. It is a body selected cooperatively by the State and the defendant. And in Georgia the defendant has twice the voice of the State as to its composition. 33/

What the fatal degree of infrequency is the petitioner does not inform us. Nor does he inform us of the specific infrequency of imposition of the death penalty by Georgia juries. Yet he postulates that such unknown infrequency subjects an enactment of the General Assembly of Georgia to a finding of unconstitutinality. Certainly such blatent self-serving generalities will will not suffice in a constitutional court.

33/ Under Ga. Law for the trial of any case which could result in a punishment of death or imprisonment for not less than four years, the defendant has 20 peremptory challenges, the State 10. Ga. Code Ann. § 59-805.

Petitioner makes the mistake of looking only at the convicted criminal, with respect to punishment, and not to society as a whole and to the victim and to future victims:

> But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." Cardozo, J., Snyder v. Mass., 291 U.S. 97, 122 (1934).

The picture is askance if it is viewed only from the point of view of the condemned criminal. The Court must look at the penalty from the point of view also of society, of the victims in these cases and future victims of violent crimes, of the capabilities of current law enforcement as well as the capabilities of current penal systems.

The death penalty is a means of self-defense for the members of society. Capital crimes violate the imperative of social preservation. The contest is not between the State and the individual; it is wholly between competing rights of the individual - the right to be protected from criminal attack and the several rights in the amendments. A basic, if not the first right of the individual, is to be protected from attack. That is why we have government.

Retention of the death penalty insures a greater fear in the potential criminal and thereby contributes to a more civilized society wherein citizens may live and move with a diminished apprehension of criminal attack. Forbidding the imposition of the penalty can do no more than foster social permissiveness among law-breakers at the cost of social permissiveness among law-abiding citizens.

CONCLUSION

It has not been demonstrated that the death penalty as provided for under Georgia law is excessive or disproportionate to a constitutional degree, barbaric, contrary to commonly-held notions of human decency, unnecessarily or inherently cruel. Petitioner has not met the burden of proving that the legislatively-provided penalties are contrary to the constitutional principles invoked.

The Constitution does not demand the abolition of forfeiture of life as a penalty for crime and as a weapon against crime by way of its existence as a threat; the Constitution does not demand that the balance of fear weigh more heavily on the citizen than on the potential capital criminal.

The judgment of the Supreme Court of Georgia should be affirmed.

Respectfully submitted,

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_____
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APPENDIX A

1. Statutory Procedures

The 1973 Georgia statute to be tested in light of the Eighth and Fourteenth Amendments is Ga. Laws 1973, p. 159, which provides "procedures and requirements for the authorization of (the death penalty)." The trial in this case was conducted pursuant to this statute, and it preceded enactment of Ga. Laws 1974, p. 352, which, in converting Georgia from jury sentencing to judge sentencing (in non-capital cases only), also amended sections of laws concerned with death penalty procedures. The change of language brought about by the 1974 amendments did not significantly affect death penalty procedures.

Portions of these two laws directly amend the Code of Georgia (1933), and others amend or enact statutory law not made a part of the Code. Most of the provisions of the two laws have been codified unofficially in "Ga. Code Ann." When this is the case, that reference is indicated in the marginal captions to the provisions quoted below:

Ga. Code Ann. § 26-3102 (Supp. 1975).

"26-3102. Capital offenses; jury verdict and sentence. Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstance shall be necessary in offenses of treason or aircraft hijacking. The provisions of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty." (Ga. Laws 1973, p. 159, 170).

Ga. Code Ann. § 27-2302 (Supp. 1975).

"27-2302. Recommendation to mercy. - In all capital cases, other than those of homicide, when the verdict is guilty, with a recommendation to mercy, it shall mean imprisonment for life.

"When the verdict is guilty without a recommendation to mercy it shall be legal and shall mean that the convicted person shall be sentenced to death. However, when it is shown that a person convicted of a capital offense without a recommendation to mercy had not reached his seventeenth birthday at the time of the commission of the offense the punishment of such person shall not be death but shall be imprisonment for life." Ga. Laws 1963, p. 122, 123.

[As amended by Ga. Laws 1974, p. 352, 353, this now reads:

["27-2302. Recommendation to mercy. - In all capital cases, other than those of homicide, when the verdict is guilty, with a recommendation to mercy, it shall be legal and shall be a recommendation to the judge of imprisonment for life. Such recommendation shall be binding upon the judge."]

Ga. Code Ann. § 27-2401 (1975 Supp.)

"27-2401. Stenographic notes; entry of testimony of minutes of court; transcript or brief. - On the trial of all felonies the presiding judge shall have the testimony taken down, and, when directed by the judge, the court reporter shall exactly and truly record, or take stenographic notes of, the testimony and proceedings in the case, except the argument of counsel. In the event of a verdict of guilty, the testimony shall be entered on the minutes of the court or in a book to be kept for that purpose. In the event that a sentence of death is imposed, the transcript of the case shall be prepared at the earliest possible time and shall take priority in preparation over all other cases. . . ." (Ga. Laws 1973, pp. 159, 169).

Ga. Code Ann. § 27-2503.

"27-2503. Presentence hearings in felony cases. - (a) Except in cases in which the death penalty may be imposed, upon the return of a verdict of 'guilty' by the jury in any felony case, the judge shall dismiss the jury and shall conduct a presentence hearing at which the only issue shall be the determination of punishment to be imposed. In such hearing the judge shall hear additional evidence in extenuation, mitigation,

and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any prior conviction and pleas; Provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The judge shall also hear argument by the defendant or his counsel and the prosecuting attorney, as provided by law, regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument. In cases in which the death penalty may be imposed, the judge when sitting without a jury shall follow the additional procedure provided in Code section 27-2534.1. Upon the conclusion of the evidence and arguments the judge shall impose the sentence or shall recess the trial for the purpose of taking the sentence to be imposed under advisement. The judge shall fix a sentence within the limits prescribed by law. If the trial court is reversed on appeal because of error only in the presentence hearing, the new trial which may be ordered shall apply only to the issue of punishment.

"(b) In all cases in which the death penalty may be imposed and which are tried by a jury, upon a return of a verdict of guilty by the jury, the court shall resume the trial and conduct a presentence hearing before the jury. Such hearing shall be conducted in the same manner as presentence hearings

conducted before the judge as provided in subsection (a) of this Section. Upon the conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions, and the jury shall retire to determine whether any mitigating or aggravating circumstances, as defined in Code section 27-2534.1, exist and whether to recommend mercy for the defendant. Upon the findings of the jury, the judge shall fix a sentence within the limits prescribed by law." (Ga. Laws 1974, pp. 352, 358. [Replacing former Ga. Code Ann. § 27-2534, as of July 1, 1974.]

Ga. Code Ann. § 27-2528.

"Section 1. Any person who has been indicted for an offense punishable by death may enter a plea of guilty at any time after his indictment, and the judge of the superior court having jurisdiction may, in his discretion, during term time or vacation, sentence such person to life imprisonment, or to any punishment authorized by law for the offense named in the indictment. Provided, however, that the judge of the superior court must find one of the statutory aggravating circumstances provided in Code section 27-2534.1 before imposing the death penalty except in cases of treason or aircraft hijacking." (Ga. Laws 1973, pp. 159, 171).

Ga. Code Ann. § 27-2534.

"Section 1A. At the conclusion of all felony cases heard by a jury, and after argument of counsel and proper charge from the court, the jury shall retire to consider a verdict of guilty or not guilty without any consideration of punishment. In non-jury felony cases, the judge shall likewise first consider a finding of guilty or not guilty without any consideration of punishment. Where the jury or judge returns a verdict or finding of guilty, the court shall resume the trial and conduct a pre-sentence hearing before the jury or judge at which time the only issue shall be the determination of punishment to be imposed. In such hearing, subject to the laws of evidence, the jury or judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any such prior criminal convictions and pleas; provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The jury or judge shall also hear argument by the defendant or his counsel and the prosecuting attorney, as provided by law, regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument to the jury or judge. Upon the conclusion of the evidence and arguments, the judge shall give the jury appropriate

instructions and the jury shall retire to determine the punishment to be imposed. In cases in which the death penalty may be imposed by a jury or judge sitting without a jury, the additional procedure provided in Code Section 27-2534.1 shall be followed. The jury, or the judge in cases tried by a judge, shall fix a sentence within the limits prescribed by law. The judge shall impose the sentence fixed by the jury or judge, as provided by law. If the jury cannot, within a reasonable time, agree to the punishment, the judge shall impose sentence within the limits of the law; provided, however, that the judge shall in no instance impose the death penalty when, in cases tried by a jury, the jury cannot agree upon the punishment. If the trial court is reversed on appeal because of error only in the presentence hearing, the new trial which may be ordered shall apply only to the issue of punishment." (Ga. Laws 1973, pp. 159, 162, superseded by Ga. Laws 1974, pp. 352, 358.) [Ga. Code § 27-2503].

Ga. Code Ann. § 27-2534.1:

"27-2534.1 Mitigating and aggravating circumstances; death penalty. - (a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

"(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any

mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

"(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

"(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

"(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

"(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

"(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

"(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

"(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

"(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

"(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

"(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

"(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in Code section 27-2534.1(b) is so found, the death penalty shall not be imposed." (Ga. Laws 1973, p. 159, 164).

Ga. Code Ann. § 27-2537.

"27-2537. Review of death sentences. (a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court, within ten days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Georgia together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and

the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of Georgia.

"(b) The Supreme Court of Georgia shall consider the punishment as well as any errors enumerated by way of appeal.

"(c) With regard to the sentence, the court shall determine:

"(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

"(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Code section 27-2534.1(b), and

"(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

"(d) Both the defendant and the State shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

"(e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

"(1) Affirm the sentence of death; or

"(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of Georgia in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

"(f) There shall be an Assistant to the Supreme Court, who shall be an attorney appointed by the Chief Justice of Georgia and who shall serve at the pleasure of the court. The court shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. The Assistant shall provide the court with whatever extracted information it desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant.

"(g) The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence.

"(h) The office of the Assistant shall be attached to the office of the Clerk of the Supreme Court of Georgia for administrative purposes.

"(i) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence." (Ga. Laws 1973, pp. 159, 164).

Ga. Code Ann. § 70-301 (1975 Supp.):

"Section 16. All applications for new trial, except in extraordinary cases shall be made within thirty (30) days of the entry of the judgment on the verdict, or entry of the judgment where the case was tried without a jury. The motion may be amended any time on or before the ruling thereon, and where the grounds thereof require consideration of the transcript of evidence or proceedings, the court may in its discretion grant an extension

of time, except in cases where the death penalty is imposed, for the preparation and filing of the transcript, which may be done any time on or before the hearing, or the court may in its discretion hear and determine the motion before the transcript of evidence and proceedings is prepared and filed. The grounds of the motion need not be approved by the court. The motion may be heard in vacation or term time, but where not heard at the time named in the order, whether in term time or vacation, it shall stand for hearing at the next term or at such other time in term or vacation as the court by order at any time may prescribe, unless sooner disposed of. Motions for new trial in cases in which the death penalty is imposed shall be given priority. On appeal, a party shall not be limited to the grounds urged in the motion, or any amendment thereof. The court also shall be empowered to grant a new trial on its own motion within thirty (30) days from entry of the judgment, except in criminal cases where the defendant was acquitted." (Ga. Laws 1973, pp. 159, 168).

Severability Clause in 1973 Act:

"Section 10. In the event any section, subsection, sentence, clause or phrase of this Act shall be declared or adjudged invalid or unconstitutional, such adjudication shall in no manner affect the other sections, subsections, sentences, clauses, or phrases of

this Act, which shall remain of full force and effect, as if the section, subsection, sentence, clause or phrase so declared or adjudged invalid or unconstitutional were not originally a part hereof. The General Assembly hereby declares that it would have passed the remaining parts of this Act if it had known that such part or parts hereof would be declared or adjudged invalid or unconstitutional." (Ga. Laws 1973, pp. 159, 172).

Effective Date, 1973 Act:

"Section 11. This Act shall become effective upon its approval by the Governor or upon its becoming law without his approval. The Supreme Court may suspend consideration of death penalty cases until January 1, 1974, or such earlier times as the court determines it is prepared to make the comparisons required under the provisions of this Act." (Ga. Laws 1973, pp. 159, 172).

Repealer, 1973 Act:

"Section 12. All laws and parts of laws in conflict with this Act are hereby repealed. Approved March 28, 1973." (Ga. Laws 1973, pp. 159, 172).

2. Capital Crimes

a. Current capital crimes:

The procedures set out above are for application in six offenses:

Ga. Code Ann. § 26-1101 (1972 Rev.)

"26-1101. Murder.—(a) A person commits murder when he unlawfully and with malice aforethought either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.

"(b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.

"(c) A person convicted of murder shall be punished by death or by imprisonment for life." (Ga. Laws 1968, pp. 1249, 1276).

Ga. Code Ann. § 26-1311.

"26-1311. Kidnapping. -

(a) A person commits kidnapping when he abducts or steals away any person without lawful authority or warrant and holds such person against his will.

"(b) A person over the age of 17 commits kidnapping when he forcibly, maliciously, or fraudulently leads, takes, or carries away, or decoys or entices away, any child under the age of 16 years against the will of the child's parents or other person having lawful custody.

"A person convicted of kidnapping shall be punished by imprisonment for not less than one nor more than 20 years; Provided that a person convicted of kidnapping for ransom shall be punished by life imprisonment or by death; and Provided, further, that if the person kidnapped shall have received bodily injury, the person convicted shall be punished by life imprisonment or by death." (Ga. Laws 1968, pp. 1249, 1282).

Ga. Code Ann. § 26-1902:

"26-1902. Armed robbery. - A person commits armed robbery when, with intent to commit theft, he takes property of another from the person or the immediate presence of another by use of an offensive weapon. The offense robbery by intimidation shall be a lesser included offense in the offense of armed robbery. A person convicted of armed robbery shall be punished by death or imprisonment for life, or by imprisonment for not less than one nor more than 20 years." (Ga. Laws 1968, pp. 1249, 1298; as amended Ga. Laws 1969, p. 810).

Ga. Code Ann. § 26-2001:

"26-2001. Rape. - A person commits rape when he has carnal knowledge of a female, forcibly and against her will. Carnal knowledge in rape occurs when there is any penetration of the female sex organ by the male sex organ. A person convicted of rape shall be punished by death or by imprisonment for life, or by imprisonment for not less than one nor more than 20 years. No conviction shall be had for rape on the unsupported testimony of the female." (Ga. Laws 1968, pp. 1249, 1299.)

Ga. Code Ann. § 26-2201:

"26-2201. Treason. - A person owing allegiance to the State commits treason when he knowingly levies war against the State, adheres to

her enemies, or gives them aid and comfort. No person shall be convicted of treason except on the testimony of two witnesses to the same overt act, or on confession in open court. When the overt act of treason is committed outside this State, the person charged therewith may be tried in any county in this State. A person convicted of treason shall be punished by death, or by imprisonment for life or for not less than 15 years." (Ga. Laws 1968, pp. 1249, 1303).

Ga. Code Ann. § 26-3301:

"26-3301. [hijacking] - Definition: punishment; continuing offense; jurisdiction. - A person commits hijacking of an aircraft when he (1) by use of force; or (2) by intimidation, by the use of threats or coercion, places the pilot of an aircraft in fear of immediate serious bodily injury to himself or to another, causes the diverting of an aircraft from its intended destination to a destination dictated by such person. A person convicted of hijacking an aircraft shall be punished by death or life imprisonment. The offense of hijacking is declared to be a continuing offense from the point of beginning and jurisdiction to try a person accused of the offense of hijacking shall be in any county of Georgia over which the aircraft is being operated." (Ga. Laws 1969, pp. 741, 742.) [see also Ga. Code Ann. § 2-202 (1973 Rev.)]

b. Perjury -

[Otherwise concerned with procedure, the 1973 statute removed perjury from the group of capital offenses. Ga. Laws 1973, p. 159, 163 (Ga. Code § 26-2401 [Supp. 1975])].

3. Prosecutorial and Grand Jury Discretion.

The responsibilities and perrogatives of the district attorney and the grand jury in prosecuting for capital crimes are shaped, in part, by the following:

Constitution of Georgia of 1945, Ga. Code Ann. § 2-3107:

"Information from officers and employees; suspension of officers. - The Governor may require information in writing from Constitutional officers, department heads, and all State employees, on any subject relating to the duties of their respective officers or employment. The General Assembly shall have authority to provide by law for the suspension of any Constitutional officer or department head from the discharge of the duties of his office, and also for the appointment of a suitable person to discharge the duties of the same." Ga. Const. Art. V, Sec. 1, Par. 17.

Constitution of Georgia of 1945, Ga. Code Ann. § 2-4602:

"2-4602 (6531) Paragraph II. Duties. - It shall be the duty of the district attorney to represent the State in all cases in the superior court of his circuit and in all cases taken up from the superior court of his circuit to the Supreme Court and Court of Appeals and to perform such other services as shall be required of him by law." Ga. Const., Art. VI, Sec. II, Par. 2.

Rules and Regulations for Organization and Government of State Bar of Georgia - Code of Professional Responsibility - Ethical Consideration - EC 7-13 (Ga. Code Ann. App. to Title 9) (1973 Rev.)

"Duty of Public Prosecutor. - The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit

of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice: the prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecution's case or aid the accused."

Id. - Code of Professional Responsibility - Disciplinary Rule - DR 7-103.

"Performing the Duty of Public Prosecutor or Other Government Lawyer. - (A) A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause."

Ga. Code § 24-2908 (1933):

"24-2908. Duties. - The duties of the district attorneys within their respective circuits are-

"1. To attend each session of the superior courts, regular or adjourned, unless excused by the judge thereof, and remain until the business of the State is disposed of.

"2. To attend on the grand juries, advise them in relation to matters of law, and swear and examine witnesses before them.

"3. To administer the oaths the laws require, to the grand and petit jurors, to the bailiffs or other officers of the court, and otherwise to aid the presiding judge in organizing the courts as he may require.

"4. To draw up all indictments or presentments, when requested by the grand jury, and to prosecute all indictable offenses.

"5. To prosecute or defend any civil action in the prosecution or defense of which the State is interested, unless otherwise specially provided for.

Ga. Code § 24-2915 (1933):

"24-2915. Entry of nolle prosequi to indictments. - The district attorney has authority, on the terms prescribed by law, to enter a nolle prosequi on indictments."

Ga. Code Ann. § 27-704 (1972 Rev.):

"27-704. Trial on accusation; waiver of indictment. - In all felony cases, other than capital felonies, in which the defendants have been bound over to the superior court, or are confined in jail pending commitment trial, or are in jail, having waived

commitment trial, the prosecuting officers of such court shall have authority to prefer accusations, and such parties shall be tried on such accusations: Provided, that parties going to trial under such accusations shall in writing waive indictment by a grand jury. Judges of the superior court may open their courts at any time without the presence of either grand jury or traverse jury to receive and act upon pleas of guilty in misdemeanor cases, and in felony cases except those punishable by death or life imprisonment, when the judge and the accused consent thereto. The judge may try the issues in such cases without a jury upon an accusation filed by the prosecuting officer where the accused has waived indictment and consented thereto in writing and counsel is present in court representing such defendant either by virtue of his employment or by appointment by the court. In all misdemeanor cases which may be prosecuted in superior court, the district attorney shall have authority, with or without the consent of the defendant, to prefer accusations, indictment by a grand jury not being required in misdemeanor cases." (Ga. Laws 1972, pp. 386, 623.)

Ga. Code § 27-1801 (1933):

"27-1801. [Nolle Prosequi] When and how allowed. - After an examination of the case in open court, and before it has been submitted

to the jury, the district attorney may enter a nolle prosequi with the consent of the court. After the case has been submitted to the jury, a nolle prosequi shall not be entered except by the consent of the defendant."

Ga. Code § 59-304 (1933):

"59-304. When bound to notice offenses. - Grand jurors are bound only to notice or make presentments of such offenses as may or shall come to their knowledge or observation after they shall have been sworn; nevertheless they have the right and power, and it is their duty as jurors to make presentments of any violations of the laws which they may know to have been committed at any previous time, which are not barred by the statute of limitations."

4. Oaths.

The prosecutor, the grand jury, the jury, and the trial judge all take the following oaths (the jury taking two):

Ga. Code § 24-2605 (1933):

"24-2605. Oath of judges. - Before entering on the duties of their office, they must take the oath required of all civil officers, and in addition the following, viz: 'I swear that I will administer justice without

respect to person, and do equal rights to the poor and the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as judge of the superior courts of this State, according to the best of my ability and understanding, and agreeably to the laws and Constitution of this State and the Constitution of the United States. So help me God.'"

Ga. Code § 24-2902 (1933):

"24-2902: Election, term of office, and oath. - There shall be a district attorney for each judicial circuit, whose official term, except when commissioned to fill an unexpired term, shall be four years. He shall be elected by the people, in the manner provided by this Code, and take the following oath, viz: 'I do swear that I will faithfully and impartially, and without fear, favor, or affection, discharge my duties as solicitor general, and will take only my lawful fees of office. So help me God.'"

Ga. Code § 59-208 (1933):

"59-208. Appointment of foreman. Oath of the grand jury. - The judge of the superior court may appoint the foreman of the grand jury or may direct the grand jury to elect its own foreman. The following oath shall be administered to the foreman and each member of all grand

juries, viz.: 'You as foreman of the grand jury for the county of ....., shall diligently inquire and true presentment make of all such matters and things as shall be given you in charge, or shall come to your knowledge, touching the present service; the State's counsel, your fellows', and your own, you shall keep secret, unless called upon to give evidence thereof in some court of law in this State; you shall present no one from envy, hatred, or malice, nor shall you leave any one unpresented from fear, favor, affection, reward, or the hope thereof, but you shall present all things truly, and as they come to your knowledge. So help you God.'"

Ga. Code § 59-706 (1933):

"59-706. Oath of panels of jury. - Each panel of the petit jury shall take the following oath: 'You shall well and truly try each cause submitted to you during the present term, and a true verdict give, according to the law as given you in charge, and the opinion you entertain of the evidence produced to you, to the best of your skill and knowledge, without favor or affection to either party, provided you are not discharged from the consideration of the case submitted. So help you God.'"

Ga. Code § 59-709 (1933):

"59-709. Oath in criminal cases. - In all criminal cases, the following oath shall be administered to the petit jury, to-wit: 'You shall well and truly try the issue formed upon this bill of indictment between the State of Georgia and A.B., who is charged (here state the crime or offense), and a true verdict give according to evidence. So help you God.'"

Ga. Code Ann. § 59-908 (Supp. 1975).

"59-908. Same; oath; disposition and seating; confinement; expense allowance. - Such alternate jurors shall take the same oath as the jurors already selected . . . ." Ga. Laws 1968, pp. 1225, 1226; Ga. Laws 1974, pp. 325, 328).

5. Execution.

Procedures for implementing the death penalty include the following:

Ga. Code Ann. § 27-2512 (1972 Rev.)

"27-2512. Electrocution substituted for hanging; place of execution. - All persons who shall be convicted of a capital crime and who shall have imposed upon them the sentence of death, shall suffer such punishment by electrocution instead of by hanging.

"In all cases in which the defendant is sentenced to be electrocuted it shall be the duty of the trial judge, in passing sentence, to direct that the defendant be delivered to the Director of Corrections for electrocution at such penal institution as may be designated by said Director. However, no executions shall be held at the old prison farm in Baldwin county." (Ga. Laws 1924, pp. 195, 197; Ga. Laws 1937-38, Extra. Sess., p. 330).

Ga. Code Ann. § 27-2513 (1972 Rev.):

"27-2513. Death chamber and apparatus. - The Board of Corrections shall provide a death chamber and all necessary apparatus, machinery and appliances for inflicting such penalty by electrocution." (Ga. Laws 1956, pp. 161, 180).

Ga. Code § 27-2514 (1933):

"27-2514. Sentence of death; copy for penitentiary superintendent;time and mode of conveying prisoner to penitentiary; expenses. - Upon a verdict or judgment of death made by a jury or a judge, it shall be the duty of the presiding judge to sentence such convicted person to death according to the provisions of this law, and to make such sentence in writing, which shall be filed with the papers in the case against such convicted

person, and a certified copy thereof shall be sent by the clerk of the court in which said sentence is pronounced to the superintendent of the State penitentiary, not less than 10 days prior to the time fixed in the sentence of the court for the execution of the same, and in all cases it shall be the duty of the sheriff of the county in which such convicted person is so sentenced, together with one deputy or more if in his judgment it is necessary, and provided that in all cases the number of guards shall be approved by the trial judge, or if he is not available, by the ordinary of said county in which such prisoner is sentenced, to convey such convicted person to said penitentiary, not more than 20 days nor less than two days prior to the time fixed in the judgment for the execution of such condemned person, unless otherwise directed by the Governor, or unless a stay of execution has been caused by appeal, granting of new trial, or other order of a court of competent jurisdiction, and the expense for transporting of said person to the penitentiary for the purpose of electrocution shall be paid by the ordinary of the county wherein the conviction was had, or the board of commissioners of roads and revenues, the county commissioner, or other person or persons having charge of the county funds, out of any funds on hand in the treasury of such county."

Ga. Code Ann. § 27-2515 (1972 Rev.).

"27-2515. Execution by warden and assistants; witnesses. - There shall be present at such execution the warden of the penitentiary, or a deputy warden thereof, who shall serve as executioner, at least two assistants, two physicians to determine when death supervenes, an electrician, a suitable guard, and, if the condemned person so desires, his counsel, relatives and such clergyman and friends as he may desire." (Ga. Laws 1956, pp. 161, 182).

Ga. Code § 27-2516 (1933):

"27-2516. Certificate of execution. - The executioner and attending physician shall certify the fact of such execution to the clerk of the superior court of the county in which said sentence was pronounced, which certificate shall be filed by the clerk with the papers in the case."

Ga. Code § 27-2518. (1933):

"27-2518. Change of date for execution; limit for new date; record of order. - Where the date for the execution of any such convict in a capital case has passed by reason of a supersedeas incident to the suing out of a bill of exceptions to the judgment of the trial court, or a respite by the Governor, or for any other reason, the judge of the superior court of the county

where the case was tried shall have power and authority without requiring the convict to be brought before him by habeas corpus, as provided in section 27-2521, to pass an order in term time or vacation fixing a new date for the execution of the original sentence, said order to be recorded on the minutes of said court as other official orders and sentences are required by law to be done and a certified copy of said order shall be sent immediately to the superintendent of the State penitentiary at the place of execution. The judge shall fix the new date not less than 10 nor more than 20 days from the date of such order."

Ga. Code § 27-2521 (1933):

"27-2521. Writ of habeas corpus or warrant to issue if execution not done. - Whenever, for any reason, any convict sentenced to the punishment of death shall not have been executed pursuant to such sentence, and the same shall stand in full force, the presiding judge of the superior court where the conviction was had, on the application of the solicitor general of the circuit, or other person prosecuting for the State, shall issue a habeas corpus to bring such convict before him; or if such convict be at large, said judge or any judicial officer may issue a warrant for his apprehension; and upon the convict being brought before the judge, either by habeas corpus or

under such warrant, he shall proceed to inquire into the facts and circumstances of the case; and if no legal reason exists against the execution of the sentence, he shall sign and issue a warrant to the warden of the penitentiary, commanding him to do execution of such sentence at such time and place as shall be appointed, which the warden shall do accordingly; and the judge shall cause the proceedings to be entered on the minutes of the superior court of the county."

Ga. Code § 27-2602 (1933):

"27-2602. Disposition of insane convicts. Cost of investigations. - Upon satisfactory evidence being offered to the Governor, showing reasonable grounds to believe that a person convicted of a capital offense has become insane subsequent to his conviction, the Governor may, in his discretion, have said person examined by such expert physicians as the Governor may choose, the cost of said examination to be paid by the Governor out of the contingent fund. It shall be the responsibility of the Governor to cause said physicians to receive written instructions which plainly set forth the legal definitions of insanity as recognized by the laws of this State, and said physician shall, after making the necessary examination of the prisoner, report in writing to the Governor whether

or not reasonable grounds exist to raise an issue that the prisoner is insane by the standards previously specified to them by the Governor. The Governor may, if he shall determine that the person convicted has become insane, have the power of committing him to the Milledgeville State Hospital until his sanity shall have been restored or determined by laws now in force."

Ga. Code § 27-2603 (1933):

"27-2603. Insane convict committed to the Milledgeville State Hospital. - When any person shall, after conviction of a capital crime, become insane, and shall be so declared in accordance with the provisions of the preceding section, the convict shall be received into the Milledgeville State Hospital, there to be safely kept and treated as other adjudged insane persons. All the provisions of the law relating to insane persons under sentence of imprisonment in the penitentiary shall apply to the class of cases herein provided for, so far as applicable."

Ga. Code § 27-2604 (1933):

"27-2604. Resentence and warrant on recovery of convict. - If the convict mentioned in the preceding section should recover, the fact shall be at once certified by the superintendent of the Milledgeville

State Hospital to the judge of the court in which the conviction occurred. Whenever it shall appear to the judge by said certificate, or by inquisition or otherwise, that the convict has recovered and is of sound mind, he shall have the convict removed to the jail of the county in which the conviction occurred, or to some other safe jail, and shall pass sentence, either in term time or vacation, upon the convict, and he shall issue a new warrant directing the sheriff to do execution of the sentence at such time and place as may be named in the warrant, which the sheriff shall be bound to do accordingly. The judge shall cause the new warrant, and other proceedings in the case, to be entered on the minutes of said superior court."

6. Clemency.

Clemency is authorized as follows:

Constitution of Georgia of 1945; Ga. Code Ann. § 2-3011 (1973 Rev.):

"2-3011. Paragraph XI. Reprieves and pardons; State Board of Pardons and Paroles. - The Governor shall have power to suspend the execution of a sentence of death, after conviction, for offenses against the State, until the State Board of Pardons and Paroles, hereinafter provided, shall have an opportunity of hearing the application of the convicted person for any relief within the power of such board, or for any other purpose which may be deemed necessary by the Governor.

Upon conviction for treason the Governor may only suspend the execution of the sentence and report the case to the General Assembly at the next meeting thereof, when the General Assembly shall either pardon, commute the sentence, direct its execution or grant a further reprieve. The Governor shall, at each session of the General Assembly, communicate to that body each case of suspension of sentence, stating the name of the convict, the offense for which he was convicted, the sentence and its date, the date of the reprieve or suspension, and the reasons for granting the same. He shall take care that the laws are faithfully executed, and shall be a conservator of the peace throughout the State. There shall be a State Board of Pardons and Paroles to be composed of not less than five or more than seven members, the number to be determined by the General Assembly.... The State Board of Pardons and Paroles shall have power to grant reprieves, pardons and paroles, to commute penalties, remove disabilities imposed by law, and may remit any part of a sentence for any offense against the State, after conviction except in cases oftreason or impeachment, and except in cases in which the Governor refuses to suspend a sentence of death: Provided that such board shall act on all applications within 90 days from the filing of same, and in all cases a majority shall decide the action

of the board. If any member for any cause is unable to serve in any case involving capital punishment when the board shall consist of three members, the Governor shall act as the third member of said board and the action so taken in such instance shall be by unanimous vote. The State Board of Pardons and Paroles shall at each session of the General Assembly communicate to that body in full detail each case of pardon, parole, commutation, removal of the convict, the offense for which he was convicted, the sentence and its date, the date of the pardon, parole, commutation, removal of the convict the offense for which he was convicted, the sentence and its date, the date of the pardon, parole,commutation, removal of disabilities or remission of sentence and the reasons for granting the same, and the State Board of Pardons and Paroles may make rules and regulations as may be authorized by law.

"Each year the board shall elect one of its members to serve as chairman of the board for the ensuing year. The General Assembly may enact laws in aid of, but not inconsistent with, this paragraph." (Ga. Const., Art. V, Sec. I, Par. 11.)

Ga. Code Ann. § 77-502.3 (1973 Rev.)

"77-502.3 Same; cases involving capital punishment. - In the event any member of the State Board of Pardons and Paroles is disqualified or unable to serve in any case involving capital punishment and the Governor is also disqualified or for any cause is unable to act as the third member of the State Board of Pardons and Paroles, the Governor or the person exercising the executive power shall, by executive order, appoint a person to serve in the place and stead of the Governor.

"Notwithstanding any other law to the contrary, such appointee may be an elected official, appointed official or an employee of the State of Georgia. The order appointing such person to serve in the place and stead of any such member and the Governor shall include the compensation to be received by such person." (Ga. Laws 1970, pp. 729, 733).

Ga. Code Ann. § 77-511 (1973 Rev.)

"77-511. Power of board to grant reprieves, pardons, and paroles. Duty to supervise parolees, aid parolees and probationers, and study cases of prisoners. - The State Board of Pardons and Paroles shall have power to grant reprieves, pardons

and paroles, to commute penalties, to remove disabilities imposed by law, and to remit any part of a sentence for offenses against the State, after conviction, except in cases of treason and impeachment, and except in cases in which the death sentence has been imposed and the Governor refuses to suspend the execution of such death sentence to enable the board to consider and pass upon the same. In all cases when the Governor has suspended the execution of a death sentence to enable the board to consider and pass on same it shall be mandatory that said board act within a period not exceeding 90 days from the date of the suspension order of the Governor. In all cases of clemency, pardons and paroles, a majority vote of the members is sufficient for approval except in cases involving capital punishment, and in such cases a unanimous vote of all members of the board is necessary: Provided, however, if any member for any cause is unable to serve in any case involving capital punishment the Governor shall act as the third member of said board and the action so taken in such instances shall be by unanimous vote. In the cases which the board has power to consider, such board shall be charged with the duty of determining what prisoners serving sentences imposed by a court of this State may be released on pardon or parole, and affixing the time and conditions thereof. The Board shall also be charged with the duty of supervising all persons placed on parole; of determining violations thereof and of taking action with reference thereto;

of making investigations as may be necessary and of aiding parolees or probationers in securing employment. It shall be the duty of the board personally to study the cases of those prisoners whom the board has power to consider, so as to determine their ultimate fitness for such relief as the board has power to grant: Provided, however, that the board by an affirmative vote of two of its members shall have the power to commute a sentence of death to one of life imprisonment." (Ga. Laws 1943, pp. 185, 187; Ga. Laws 1973, pp. 1294, 1295.)

Ga. Code Ann. § 77-513 (1973 Rev.)

"77-513. Vote required to extend clemency; written opinions. - No person shall be treated clemency, pardon or parole or other relief from sentence except by a majority vote of the board and in all cases involving capital punishment, a unanimous vote of all members is necessary provided two members of said board may commute a death sentence to life imprisonment, as provided in section 77-511. However, each member of the board shall render a written decision on each case considered by the board and such written decision shall become a part of the permanent record." (Ga. Laws 1943, pp. 185, 189).

Ga. Code Ann. § 77-526 (1973 Rev.)

"77-526. Duty of board to make reports. On or before the first day of January each year the board shall make a written report of its activities, copies of which shall be sent to the Governor and to the Attorney General and to such other officers and persons as the board may deem advisable. One copy of said report shall become a part of the records of the board. Biennially the board shall make a full and complete report to the General Assembly of Georgia." (Ga. Laws 1943, pp. 185, 194).

Rules and Regulations of the State of Georgia - Board of Pardons and Paroles:

R. 475-2-.01(1):

"The Board shall have the power to grant reprieves, pardons and paroles, to commute penalties, remove disabilities imposed by law and may remit any part of sentence(s) for any offenses against the State, after conviction except in cases of treason or impeachment, and except in cases which the death penalty has been imposed and the Governor has refused to suspend execution to permit the Board to act upon the same. The Board is charged with the duty of determining which individuals may be granted relief and determining conditions and requirements for all persons placed on parole."

R. 475-3-.01 (2) (b) (c) (3)(a):

"(2) Commutation: (b) Application for commutation of a death sentence to life imprisonment may be in any written form and must contain grounds on which the request for commutation is based. Application will be considered by the Board.Where sufficient time for consideration does not remain, the Board will request the Governor to grant a stay of execution. A copy of the application for commutation will be furnished to the District Attorney of the county of conviction at least five days prior to the hearing date set by the Board; if practicable. The Board requests that application for commutation of a death sentence be submitted only when all legal remedies in State and Federal courts have been exhausted.

"(c) The Board will consider a commutation of a sentence imposed in other than death cases only when substantial evidence is submitted to the Board in writing that the sentence is either excessive, illegal, unconstitutional or void; that the ends of justice would be best served thereby, and that such action would be in the best interests of society and the inmate. Evidence submitted under this requirement must be direct evidence and affirmatively stated.

"(3) Pardons: (a) An order of pardon relieves an individual from the legal consequences of a particular crime or conviction Application for pardons may be in any written form. The Board will initiate an investigation for purposes of pardon where there is substantial evidence showing innocence or complete justification on the part of the inmate."

Report of The Trial Judge

of the

APPENDIX B

Superior Court of Gwinnett County, Georgia 1b

The State vs. Troy Leon Gregg
(A case in which the death penalty was imposed)

A. Data Concerning the Defendant

Name: Gregg (Last,) Troy (First) Leon (Middle) 2. Date of Birth 4 22 48 (Mo. Day Year)

Social Security Number 551 68 6135
Sex: M [x] F [ ]
3. Marital Status: Never Married [ ] Married [ ] Divorced [x] Spouse Deceased [ ]

Children
(a) Number of children 0
(b) Ages of children: 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18
(Circle age of each child)
Father living: yes [ ] no [x] If deceased, give date of death ?
Mother living: yes [ ] no [x] If deceased, give date of death ?
Number of children born to parents ?
Education--Highest Grade Completed: 1 2 3 4 5 6 7 8 9 10 (11) 12 13 14 15 16 17
(Circle one) [college]
Intelligence Level: (IQ below 70) Low [ ]
(IQ 70 to 100) Medium [ ] ? NO TESTS GIVEN
(IQ above 100) High [ ]

Psychiatric Evaluation Performed? Yes [ ] No [x]
If performed is defendant:
a. Able to distinguish right from wrong? [ ] [ ]
b. Able to adhere to the right? [ ] [ ]
c. Able to cooperate intelligently in his own defense [ ] [ ]
If examined, were character or behavior disorders found? Yes [ ] No [ ]
(If answer is yes please elaborate)

What other pertinent psychiatric [and psychological] information was revealed

None

Prior Work Record of Defendant:

Type Job	Pay	Dates Held	Reason for Termination
a. Truck Driver	?	?	?
b.			
c.			
d.			
e.			

*A separate report must be submitted for each defendant sentenced to death.

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1. Was the case tried with or without jury? With [ ] Without [ ]
2. How did the defendant plead? Guilty [ ] Not guilty [x]

C. Offense Related Data

1. Capital Offense for Which Penalty Imposed:
   a. Treason.....[ ]
   b. Murder.....[x]
   c. Kidnapping for Ransom.....[ ]
   d. Kidnapping where Injury Results.....[ ]
   e. Aircraft Hijacking.....[ ]
   f. Rape.....[ ]
   g. Armed Robbery.....[x]
2. Were other offenses tried in the same trial? yes [x] no [ ]

   If other offenses were tried in the same trial list those offenses.

   a. Armed Robbery (2 counts)
   b. Murder (2 counts)
   c. _____
   d. _____
3. If tried with jury, did the jury recommend the death sentence? Yes [x] No [ ]
4. Statutory aggravating circumstances found: Yes [x] No [ ]
5. Which of the following statutory aggravating circumstances were instructed and which were found?

	Instructed	Found
a. (1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or	[ ]	[ ]
(2) The offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions,	[ ]	[ ]
b. (1) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery or	[x]	[x]
(2) The offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.	[ ]	[ ]
c. The offender by his act of murder, armed robbery, or kidnaping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.	[ ]	[ ]

d. The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.	[x]	[x]
e. The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.	[ ]	[ ]
f. The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.	[ ]	[ ]
g. The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.	[x]	[x]
h. The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.	[ ]	[ ]
i. The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.	[ ]	[ ]
j. The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.	[ ]	[ ]

6. List non statutory aggravating circumstances indicated by the evidence, if any.
   a. None
   b. _____
   c. _____
   d. _____
7. Was there evidence of mitigating circumstances? Yes [ ] No [x]
8. If so, which of the following mitigating circumstances was in evidence?
   a. The defendant has no significant history of prior criminal activity. [ ]
   b. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance. [ ]
   c. The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act. [ ]
   d. The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct. [ ]
   e. The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor. [ ]

f. The defendant acted under duress or under the domination of another person. [ ]

g. At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication. [ ]

h. The youth of the defendant at the time of the crime. [ ]

i. Other. [ ]
Please explain if (i) is checked _____

9. If tried with a jury, was the jury instructed to consider the circumstances indicated in 8 as mitigating circumstances? Yes [x] No [ ]

10. Does the defendant's physical or mental condition call for special consideration? Yes [ ] No [x]

11. Although the evidence suffices to sustain the verdict, does it foreclose all doubt respecting the defendant's guilt? Yes [x] No [ ]

12. Was the victim related by blood or marriage to defendant? Yes [ ] No [x]
13. If answer is yes, what was the relationship? _____

14. Was the victim an employer or employee of defendant? No [x]
Employer [ ]
Employee [ ]

15. Was the victim acquainted with the defendant? No [x]
Casual Acquaintance [ ]
Friend [ ]

16. Was the victim local resident or transient in the community? Resident [ ]
Transient [x]

17. Was the victim the same race as defendant? Yes [x] No [ ]

18. Was the victim the same sex as the defendant? Yes [x] No [ ]

19. Was the victim held hostage during the crime? No [x]
Yes - Less than an hour [ ]
Yes - More than an hour [ ]

20. Was the victim's reputation in the community: Good [ ]
Bad [ ]
Unknown [x]

21. Was the victim physically beaten or tortured? Yes [x] No [ ]
If yes, state extent of beating or torture: Both victims murdered.

2. What was the age of the victim? about 42

3. If a weapon was used in commission of the crime was it?
No weapon used [ ]
Poison [ ]
Motor Vehicle [ ]
Blunt Instrument [ ]
Sharp Instrument [ ]
Firearm [x]
Other _____ [ ]

4. Does the defendant have a record of prior convictions? Yes [ ] No [x]

5. If answer is yes, list the offenses, the dates of the offenses and the sentences imposed:

Offense	Date of Offense	Sentence Imposed
a. None known		
b.		
c.		
d.		

6. Was there evidence the defendant was under the influence of narcotics or dangerous drugs at the time of the offense? Yes [ ] No [x] was not

7. Was the defendant a local resident or transient in the community?
Resident [ ]
Transient [x]

D. Representation of Defendant * * See memorandum

1. Date trial counsel secured December 21, 1973

2. How was counsel secured? a. Retained by defendant [ ]
b. Appointed by Court [x]

3. If counsel was appointed by court was it because
a. Defendant unable to afford counsel? [x]
b. Defendant refused to secure counsel? [ ]
c. Other (explain) _____ [ ]

4. How many years has counsel practiced law? a. 0 to 5 [ ]
b. 5 to 10 [ ]
c. over 10 [x]

5. What is the nature of counsel's practice? a. Mostly civil [ ]
b. General [x]
c. Mostly criminal [ ]

6. Did the same counsel serve throughout the trial? Yes [ ] No [ ]

7. If not explain in detail. _____

8. (If more than one counsel answer the above questions as to each counsel and attach to this report.)

[NOTE BY RESPONDENT: The last 2 lines read: "If more than one counsel served, answer the above questions as to each counsel and attach to this report."]

E. General Considerations

1. Was race raised by the defense as an issue in the trial? Yes [ ] No [x]

2. Did race otherwise appear as an issue in the trial? Yes [ ] No [x]

3. What percentage of the population of your county is the same race as the defendant?

   a. Under 10%.....[ ]
   b. 10 to 25%.....[ ]
   c. 25 to 50%.....[ ]
   d. 50 to 75%.....[ ]
   e. 75 to 90%.....[ ]
   f. Over 90%.....[x]

4. Were members of defendant's race represented on the jury? Yes [x] No [ ]

5. If not, was there any evidence they were systematically excluded from the jury? Yes [ ] No [x]

6. Was the jury instructed to exclude race as an issue? Yes [ ] No [x]

7. Was there extensive publicity in the community concerning this case? None in excess of A.B.A. approved standards Yes [ ] No [x]

8. Was the jury instructed to disregard such publicity? Yes [ ] No [x]

9. Was the jury instructed to avoid any influence of passion, prejudice, or any other arbitrary factor when imposing sentence? Yes [x] No [ ]

10. Was there any evidence that the jury was influenced by passion, prejudice, or any other arbitrary factor when imposing sentence? Yes [ ] No [x]

11. If answer is yes, what was that evidence? _____

12. General comments of the Trial Judge concerning the appropriateness of the sentence imposed in this case Case originally scheduled for January, (1974) term of Court; on motion of defense counsel case was continued until Feb. 1974 term.

F. Chronology of Case

		Elapsed Time
1.	Date of Offense November 21, 1973	
2.	Date of Arrest November 23, 1973	2
3.	Date Trial Began February 4, 1974	73
4.	Date Sentence Imposed February 8, 1974	4

Date post trial motions ruled on April 17, 1974

Date Trial Judge's Report Completed May 29, 1974

*Date Received by Supreme Court _____

*Date Sentence Review Completed _____

*Total Elapsed Days _____

* To be completed by Supreme Court

This report was submitted to the defendant's counsel for such comments as he desired to make concerning the factual accuracy of the report, and

1. His comments are attached ( )
2. He stated he had no comments ( )
3. He has not responded ( )
4. Copy submitted to Defense counsel (X)

May 29, 1974
Date

Judge, Superior Court of
Gwinnett Judicial Circle

Gwinnett County

Appeal of trial judge
June 74
C. Willard Hardy

RE: Initial appointment of counsel for Troy Leon Gregg

On November 27, 1973 Attorneys Jim Henderson and Stan Sunderland were appointed to represent defendant Troy Leon Gregg and the co-defendant Floyd Allen. They represented the defendant at the committment hearing held on November 27, 1973. Subsequently, when it appeared that there could possibly be a conflict, attorney Hughel Harrison was appointed (on December 21, 1973) to represent defendant Troy Leon Gregg.

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APPENDIX C

Statewide homicide total for 1974 = 873. 1/ Of that total, approximately 84 per cent were homicides where the victim was a spouse, relative, or well known acquaintance of the attacker, otherwise denoted as domestic homicides. 2/ There was a total of 392 arrests for homicides in Georgia in 1974. 3/

Homicides in the City of Atlanta for 1974 = 248. 4/ Of that total, approximately 80 per cent were homicides where the victim was a spouse, relative, or well known acquaintance of the attacker. 5/

1/ CRIME IN GEORGIA, prepared by State Crime Commission, Dec. 1974, at 46.

2/ Id. at 48.

3/ Id. at 169

4/ ATLANTA CRIMINAL JUSTICE COORDINATING COUNCIL, 1976 LOCAL CRIMINAL JUSTICE MASTER PLAN, at 36.

5. Id. at 55, 327

Supreme Court, U. S.
FILED
FEB 25 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-6257

TROY LEON GREGG,

Petitioner,

—v.—

THE STATE OF GEORGIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS *AMICUS CURIAE*

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INDEX

PAGE

Statement of Interest of the N.A.A.C.P. Legal Defense and Educational Fund, Inc. 1

Question Presented 2

Constitutional and Statutory Provisions Involved 3

Statement of the Case 14

How the Federal Question Was Raised and Decided Below 21

Summary of Argument 22

I. Introduction 24

II. The Arbitrary Infliction of Death 29

A. At the Pre-sentence Hearing 29

1. Georgia's 1973 Death Penalty Legislation Is Explicitly Discretionary 29

2. The Consideration of Aggravating and Mitigating Circumstances Does Not Control Arbitrariness in the Georgia Capital Sentencing Process 30

3. Appellate Reconsideration of Death Sentences Merely Ratifies the Arbitrariness of the Georgia Capital Sentencing Process 40

4. The Results of the Georgia Sentencing Process: Caprice and Arbitrariness 49

B. Before and After the Pre-Sentencing Hearing 53

PAGE

1. Prosecutorial Charging Discretion 54
2. Plea Bargaining 55
3. Jury Discretion 58
4. Executive Clemency 65

III. The Excessive Cruelty of Death 67

CONCLUSION 68

APPENDIX 1a

TABLE OF AUTHORITIES

Cases:

Alford v. Eyman, 408 U.S. 939 (1972) 40
Allen v. State, 233 Ga. 200, 210 S.E.2d 680 (1974)..... 51
Alvarez v. Nebraska, 408 U.S. 937 (1972) 40, 52
Arkwright v. Georgia, 408 U.S. 936 (1972) 24
Atkins v. State, 228 Ga. 578, 187 S.E.2d 132 (1972)..... 46

Ballard v. State, 131 Ga. App. 847, 207 S.E.2d 246 (1974) 56
Banks v. State, 227 Ga. 578, 182 S.E.2d 106 (1971) 59
Barker v. State, 233 Ga. 781, 213 S.E.2d 624 (1975).... 47
Barrow v. State, Ga. Sup. Ct., No. 30322 51
Billingsley v. New Jersey, 408 U.S. 934 (1972)..... 52
Bowen v. State, 225 Ga. 423, 169 S.E.2d 322 (1969).... 59
Brannen v. State, —— Ga. ——, 220 S.E.2d 264 (1975) 51
Brooks v. Sturdivant, 177 Ga. 514, 170 S.E. 369 (1933) 41
Brown v. State, Ga. Sup. Ct., No. 30362, Dec. 2, 1975 37, 38, 49
Brown v. State, 228 Ga. 215, 184 S.E.2d 655 (1971)..... 64

PAGE

Caldwell v. Paige, 230 Ga. 456, 197 S.E.2d 692 (1973) 57
Callahan v. State, 229 Ga. 737, 194 S.E.2d 431 (1972) 25
Chenault v. State, 234 Ga. 216, 215 S.E.2d 223 (1975) 38, 49, 51, 64
Coker v. Georgia, No. 75-5444 2
Coker v. State, 234 Ga. 555, 216 S.E.2d 782 (1975) 38, 39, 45, 49, 51
Coley v. State, 231 Ga. 829, 204 S.E.2d 612 (1974) 22, 29, 33-34, 41, 45, 49, 51, 53
Collier v. State, 115 Ga. 803, 42 S.E. 226 (1902) 41
Commonwealth v. Edwards, 380 Pa. 52, 110 A.2d 216 (1955) 40
Commonwealth v. Green, 396 Pa. 137, 151 A.2d 241 (1959) 41
Commonwealth v. Hough, 358 Pa. 247, 56 A.2d 84 (1948) 40
Commonwealth v. Phelan, 427 Pa. 265, 234 A.2d 540 (1967) 40
Cummings v. Georgia, 408 U.S. 935 (1972) 24

Davis v. Connecticut, 408 U.S. 935 (1972) 52
Duling v. Ohio, 408 U.S. 936 (1972) 52
Dutton v. State, 228 Ga. 850, 188 S.E.2d 794 (1972) 46

Eberheart v. Georgia, No. 74-5174 2
Eberheart v. State, 232 Ga. 247, 206 S.E.2d 12 (1974) 22, 45, 49, 51
Echols v. State, 46 Ga. App. 668, 168 S.E. 790 (1933) 59
Edwards v. State, 121 Ga. 590, 49 S.E. 674 (1905) 55

Fesmire v. Oklahoma, 408 U.S. 935 (1972) 40
Fesmire v. State, 456 P.2d 573 (Okla. Ct. Cr. App. (1969) 40
Floyd v. State, 233 Ga. 280, 210 S.E.2d 810 (1974) 33, 45, 49

PAGE

Fowler v. North Carolina, No. 73-7031 .....23, 53
Furman v. Georgia, 408 U.S. 238 (1972) 2, 6, 23, 24, 34, 43, 48, 50, 51, 52, 53

Gaines v. State, 232 Ga. 727, 208 S.E.2d 798 (1974).... 39
Gaither v. State, 234 Ga. 465, 216 S.E.2d 324 (1975) 40, 51
Grant v. State, 120 Ga. App. 244, 170 S.E.2d 55 (1969) 64
Grantling v. State, 229 Ga. 746, 194 S.E.2d 405 (1972) 25
Gregg v. State, 233 Ga. 117, 210 S.E.2d 659 (1974) 22, 31, 44, 48, 49, 51, 59
Griffin v. State, 12 Ga. App. 615, 77 S.E. 1080 (1913) 55, 56, 57

Henderson v. State, 227 Ga. 68, 179 S.E.2d 76 (1970) 48, 59
Henderson v. Georgia, 408 U.S. 938 (1972)..... 24
Henderson v. State, 234 Ga. 827, 218 S.E.2d 612 (1975) 59
Herron v. Tennessee, 408 U.S. 937 (1972) 52
Hicks v. Brantley, 102 Ga. 264, 29 S.E. 459 (1897) 54, 55
Hill v. State, 232 Ga. 800, 209 S.E.2d 153 (1974) 46
Holcomb v. State, 230 Ga. 525, 198 S.E.2d 179 (1973) 62
Holston v. State, 103 Ga. App. 373, 119 S.E.2d 302 (1961) 56, 57
Hooks v. Georgia, No. 74-5954 2
Hooks v. State, 233 Ga. 149, 210 S.E.2d 668 (1974) 45, 49, 51,56
House v. Georgia, No. 74-5196 2
House v. State, 232 Ga. 140, 205 S.E.2d 217 (1974) 22, 34, 48, 49
Hurst v. Illinois, 408 U.S. 935 (1972) 40

Jackson v. Georgia, 230 Ga. 181, 195 S.E.2d 921 (1973) 25
Jackson v. Georgia, 408 U.S. 238 (1972) 24

PAGE

Jackson v. Georgia, 409 U.S. 1172 (1972) 24
Jackson v. State, 234 Ga. 549, 216 S.E.2d 834 (1975) 46
Jarrell v. State, 234 Ga. 410, 216 S.E.2d 258 (1975) 31, 46, 49
Jarrard v. State, 206 Ga. 112, 55 S.E.2d 706 (1949) 63
Jessen v. State, 234 Ga. 791, 218 S.E.2d 52 (1975) 39
Jones v. Smith, 228 Ga. 648, 187 S.E.2d 298 (1972) 61
Jones v. State, 233 Ga. 662, 212 S.E.2d 832 (1975) 39, 51
Jordan v. State, 233 Ga. 929, 214 S.E.2d 365 (1975) 49
Jurek v. Texas, No. 75-5394 .....23, 53

Lane v. Wilson, 307 U.S. 268 (1938) 29, 48
Leach v. State, 234 Ga. 467, 216 S.E.2d 326 (1975) 46, 51
Lee v. Georgia, 408 U.S. 936 (1972) 24
Lee v. State, 74 Ga. App. 212, 39 S.E.2d 426 (1946) 59
Leonard v. State, 113 Ga. 435, 66 S.E.2d 251 (1909) 59
Lerch v. State, 234 Ga. 857, 218 S.E.2d 571 (1975) 46, 51
Lewis v. State, 451 P.2d 399 (Okla. Ct. Crim. App. 1969) 41
Linder v. State, 132 Ga. App. 624, 208 S.E.2d 630 (1974) 59, 61
Lundy v. State, 119 Ga. App. 585, 168 S.E.2d 199 (1969) 63

Manor v. Georgia, 408 U.S. 935 (1972) 24
Mason v. State, Ga. Sup. Ct., No. 30338, decided Jan. 7, 1976 .....38,48, 49
Massey v. State, 220 Ga. 883, 142 S.E.2d 832 (1965) 56
Massey v. State, 229 Ga. 846, 195 S.E.2d 28 (1972) 25, 56
McCorquodale v. Georgia, No. 74-6557 2
McCorquodale v. State, 233 Ga. 369, 211 S.E.2d 577 (1974) 45, 49, 56
McCrary v. State, 229 Ga. 733, 194 S.E.2d 480 (1972) 25
McGahee v. State, 133 Ga. App. 964, 213 S.E.2d 91 (1975) 55

PAGE

McGautha v. California, 402 U.S. 183 (1971) 52
Miller v. Georgia, 408 U.S. 938 (1972) 24
Miller v. State, 226 Ga. 730, 177 S.E.2d 253 (1970) 38
Mitchell v. State, 234 Ga. 160, 214 S.E.2d 900 (1975) 32, 45, 49
Mitchell v. State, 229 Ga. 781, 194 S.E.2d 414 (1972) 24
Moore v. Illinois, 408 U.S. 786 (1972) 52
Moore v. State, 233 Ga. 861, 213 S.E.2d 829 (1975) 33, 40, 42, 44, 45, 46, 47, 49, 55, 56
Morris v. State, 228 Ga. 39, 184 S.E.2d 82 (1971) 46
Myers v. State, 97 Ga. 76, 25 S.E. 252 (1895) 41

Nichols v. State, 17 Ga. App. 593, 87 S.E. 817 (1916) 54

Park v. Georgia, 408 U.S. 935 (1972) 24
Park v. State, 206 Ga. 675, 58 S.E.2d 142 (1950) 66
Pass v. State, 227 Ga. 730, 182 S.E.2d 779 (1971) 46, 56
Patterson v. State, 124 Ga. 408, 52 S.E. 534 (1905)..... 38
Payne v. State, 231 Ga. 755, 204 S.E.2d 128 (1974)..... 62
People v. Black, 367 Ill. 209, 10 N.E.2d 801 (1937)..... 52
People v. Crews, 42 Ill.2d 60, 244 N.E.2d 593 (1969).... 41
People v. Hurst, 42 Ill.2d 217, 247 N.E.2d 614 (1969).... 40
People v. Sullivan, 245 Ill. 87, 177 N.E. 733 (1933)..... 52
Perry v. State, 78 Ga. App. 273, 50 S.E.2d 709 (1948) 59
Phelan v. Brierly, 408 U.S. 939 (1972)..... 40
Prevatte v. State, 233 Ga. 929, 214 S.E.2d 365 (1975) 36, 37, 51

Ramsey v. State, 232 Ga. 15, 205 S.E.2d 286 (1974).... 38
Reeves v. State, 22 Ga. App. 628, 97 S.E. 115 (1918).... 59
Revill v. State, 235 Ga. 71, 218 S.E.2d 816 (1975)..... 64
Roberts v. Louisiana, No. 75-5844 53
Robinson v. State, 6 Ga. App. 696, 651 S.E. 792 (1909) 41

PAGE

Robinson v. State, 109 Ga. 506, 34 S.E. 1017 (1900).... 61
Ross v. Georgia, No. 74-6207 2
Ross v. State, 233 Ga. 361, 211 S.E.2d 356 (1974).....47, 49
Ross v. State, 135 Ga. App. 169, 217 S.E.2d 170 (1975) 64
Rowland v. State, 72 Ga. App. 793, 35 S.E.2d 372 (1945) 57

Scott v. State, 53 Ga. App. 61, 185 S.E. 131 (1936)..... 55
Shearer v. State, 128 Ga. App. 809, 198 S.E.2d 369 (1973) 56
Sims v. State, 234 Ga. 177, 214 S.E.2d 902 (1975) 51
Sims v. State, 203 Ga. 665, 47 S.E.2d 862 (1948) 58
Sirmans v. State, 229 Ga. 743, 194 S.E.2d 476 (1972) 25
Smith v. Embry, 103 Ga. App. 375, 119 S.E.2d 45 (1961) 55
Smith v. Strozier, 226 Ga. 283, 174 S.E.2d 417 (1970) 54
Smithwick v. State, 199 Ga. 292, 34 S.E.2d 28 (1945) 41
Stapleton v. State, —— Ga. ——, 220 S.E.2d 269 (1975) 47, 51
State v. Alford, 98 Ariz. 124, 402 P.2d 551 (1965) 40
State v. Floyd Allen, Gwinnett County Superior Court, Indictment No. 9475 19
State v. Alvarez, 182 Neb. 358, 154 N.W.2d 746 (1967) 40
State v. Eaton, 19 Ohio St. 145, 249 N.E.2d 897 (1969) 52
State v. Hall, 176 Neb. 295, 125 N.W.2d 918 (1964) 41
State v. Maloney, 105 Ariz. 348, 464, P.2d 793 (1970) 41
State v. Reynolds, 41 N.J. 163, 195 A.2d 449 (1963) 52
State v. Tudor, 154 Ohio St. 249, 95 N.E.2d 285 (1950) 52
Stein v. New York, 346 U.S. 156 (1953) 65
Stevens v. State, 228 Ga. 621, 187 S.E.2d 281 (1972) 46
Sullivan v. Georgia, 408 U.S. 935 (1972) 24
Sullivan v. State, 229 Ga. 731, 194 S.E.2d 411 (1972) 25
Sundahl v. State, 154 Neb. 550, 48 N.W.2d 689 (1951) 52

Tamplin v. State, 235 Ga. 20, 218 S.E.2d 779 (1975) 37, 46-47, 49, 51
Thacker v. Georgia, 408 U.S. 936 (1972) 24

PAGE

Thomas v. State, 233 Ga. 237, 210 S.E.2d 675 (1974) 51
Thomason v. Caldwell, 229 Ga. 637, 194 S.E.2d 112 (1972) 57

Underhill v. State, 129 Ga. App. 65, 198 S.E.2d 703 (1973) 55

Walker v. Georgia, 408 U.S. 936 (1972) 24
Walker v. State, 5 Ga. App. 606, 63 S.E. 605 (1909) 38
Walker v. State, 132 Ga. App. 476, 208 S.E.2d 350 (1974) 41
Waller v. State, 107 Ga. App. 609, 131 S.E.2d 111 (1963) 59
Ward v. State, 231 Ga. 484, 202 S.E.2d 421 (1973) 61, 62
Waters v. Walkover Shoe Shop, 142 Ga. 137, 82 S.E. 537 (1914) 55
Watson v. State, 229 Ga. 787, 194 S.E.2d 407 (1972) 25
Webb v. Henlery, 209 Ga. 447, 74 S.E.2d 7 (1953) 54
Wilburn v. State, 230 Ga. 675, 198 S.E.2d 857 (1973) 25
Williams v. Georgia, 408 U.S. 936 (1972) 24
Williams v. State, 126 Ga. 454, 191 S.E.2d 100 (1972) 63
Williams v. State, 232 Ga. 203, 206 S.E.2d 37 (1974)....63, 64
Witherspoon v. Illinois, 391 U.S. 510 (1968) 53
Wood v. State, 234 Ga. 758, 218 S.E.2d 47 (1975) 51
Woodruff v. State, 164 Tenn. 530, 51 S.W.2d 843 (1932) 52
Woolfolk v. State, 81 Ga. 558, 8 S.E. 724 (1889) 41

York v. State, 226 Ga. 281, 174 S.E.2d 418 (1970) 63

Zirkle v. State, —— Ga. ——, 219 S.E.2d 389 (1975) 46, 47, 51

PAGE

Statutes:

United States Constitution, Eighth Amendment 3
United States Constitution, Fourteenth Amendment 3
Ariz. Rev. Stat. §13-1717 (1956) 40
Conn. Gen. Stat. Ann. §53-10 (1967) 52
Ga. Const. Ann. §2-3011 (1972) 65, 66
Ga. Code Ann. §24-2908(2), (1971) 54
Ga. Code Ann. §26-505 (1972) 58
Ga. Code Ann. §26-901(a) (1972) 62
Ga. Code Ann. §26-901(f) (1972) 63
Ga. Code Ann. §26-902 (1972) 62-63
Ga. Code Ann. §26-1004 (1972) 61
Ga. Code Ann. §26-1101 (1972) 3, 59-60
Ga. Code Ann. §26-1102 (1972) 60
Ga. Code Ann. §26-1303 (1972) 61
Ga. Code Ann. §26-1305 (1972) 32
Ga. Code Ann. §26-1311 (1972) 3, 32
Ga. Code Ann. §26-1902 (1972) 4
Ga. Code Ann. §26-2001 (1972) 4
Ga. Code Ann. §26-2201 (1972) 5
Ga. Code Ann. §26-2401 (1972) 26
Ga. Code Ann. §26-3102 (1975 Supp.) 5, 25, 28, 33, 35
Ga. Code Ann. §26-3301 (1972) 5
Ga. Code Ann. §27-1801 (1973) 55

PAGE

Ga. Code Ann. §27-2302 (1975 Supp.) 6
Ga. Code Ann. §27-2508 (1972) 61
Ga. Code Ann. §27-2512 (1972) 7
Ga. Code Ann. §27-2514 (1975 Supp.) 7
Ga. Code Ann. §27-2527(c)(3) 44
Ga. Code Ann. §27-2528 (1975 Supp.) 14, 25, 55, 56
Ga. Code Ann. §27-2534.1 (1975 Supp.) 8, 25, 26
Ga. Code Ann. §27-2534.1(b) (1975 Supp.) 25, 26, 31, 36
Ga. Code Ann. §27-2534.1(b) (1) (1975 Supp.) 29, 35
Ga. Code Ann. §27-2554.1(b) (2) (1975 Supp.) 31, 35
Ga. Code Ann. §27-2534.1(b) (3) (1975 Supp.) 35
Ga. Code Ann. §27-2534.1(b) (4) (1975 Supp.) 31
Ga. Code Ann. §27-2534.1(b) (5) (1975 Supp.) 31
Ga. Code Ann. §27-2534.1(b) (6) (1975 Supp.) 31
Ga. Code Ann. §27-2534.1(b) (7) (1975 Supp.) 32, 33, 35
Ga. Code Ann. §27-2534.1(c) (1975 Supp.) 28, 33, 36
Ga. Code Ann. §27-2537 (1975 Supp.) 10, 25, 28
Ga. Code Ann. §27-2537(c) (1975 Supp.) 28, 43, 44, 47, 48
Ga. Code Ann. §27-2537(e) (1975 Supp.) 28
Ga. Code Ann. §27-2537(f) (1975 Supp.) 48
Ga. Code Ann. §77-501 (1973) 65
Ga. Code Ann. §77-511 (1972) 65

PAGE

Ga. Code Ann. §77-513 (1975 Supp.) 65-66
Ga. Laws 1973, Act. No. 74 .....12, 25, 28, 33, 38
Ga. Laws 1974, Act. No. 854 .....6, 12
Ill. Rev. Stat. c. 38, §1-7(c)(1) 52
Neb. Rev. Stat. §29-2308 (1943) 40
N.J. Stat. Ann. §2A: 113-4 (1969) 52
Tenn. Code Ann. §39-2406 (1955) 52

Other Authorities:

BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE (1974) 23, 35, 50, 57

Brewster, *The Georgia Death Penalty Statute—Is It Constitutional, Even After Revision?* 3 Ga. J. Corr. (No. 1) 14 (1974) 43, 47

Browning, *The New Death Penalty Statutes: Perpetuating a Costly Myth,* 9 GONZAGA L. REV. 651 (1974) 31

CARDOZO, LAW AND LITERATURE (1931) 58

Comment, *Constitutional Law—Capital Punishment—*Furman v. Georgia *and Georgia's Statutory Response,* 24 MERCER L. REV. 891 (1973) 36, 39

Note, *Discretion and the New Death Penalty Statutes,* 87 HARV. L. REV. 1690 (1974) 31

Note, *Executive Clemency in Capital Cases,* 39 N.Y.U. L. REV. (1969) 66

GOLDSTEIN: THE INSANITY DEFENSE (1967) 64

PAGE

KALVIN & ZEISEL: THE AMERICAN JURY (1966) 62, 64

PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (G.P.O. 1967) 57

ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, REPORT 174 (H.M.S.O. 1973) 52

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-6257

TROY LEON GREGG,

Petitioner,

—v.—

THE STATE OF GEORGIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS *AMICUS CURIAE*

Statement of Interest of the N.A.A.C.P. Legal Defense and Educational Fund, Inc.

(1) The N.A.A.C.P. Legal Defense and Educational Fund, Inc., is a non-profit corporation formed to assist black citizens in securing their constitutional rights by the prosecution of lawsuits.

(2) The experience of Legal Defense Fund attorneys in handling capital cases over a period of many years convinced us that the death penalty is customarily applied in a discriminatory manner against racial minorities and the economically underprivileged. Further study and reflection led us to the conclusion that the evil of discrimination was not merely adventitious, but was rooted in the very

nature of capital punishment. Accordingly, in 1967, the Legal Defense Fund undertook to represent all condemned men in the United States, regardless of race, for whom adequate representation could not otherwise be found. Additionally, the Fund provided consultative assistance to attorneys representing a large number of other condemned defendants.

(3) Since this Court's decision in *Furman* v. *Georgia,* 408 U.S. 238 (1972), the Legal Defense Fund has continued to provide legal assistance to indigent condemned prisoners of all races. Fund attorneys now represent on appeal more than one hundred death-sentenced defendants. Among these are a number of prisoners condemned under Georgia's 1973 death penalty statutes; and we have filed certiorari petitions in this Court on behalf of six such prisoners. *Eberheart* v. *Georgia,* No. 74-5174; *House* v. *Georgia,* No. 74-5196; *Hooks* v. *Georgia,* No. 74-5954; *Ross* v. *Georgia,* No. 74-6207; *McCorquodale* v. *Georgia,* No. 74-6557; *Coker* v. *Georgia,* No. 75-5444.

(4) The Court's decision in the instant case may resolve the constitutional issues upon which the lives of these six men and our other Georgia clients depend.

(5) Consent has been given by petitioner and respondent for the filing of this brief *amicus curiae.*

Question Presented

Whether the imposition and carrying out of the sentence of death for the crime of murder under the law of Georgia violates the Eighth or Fourteenth Amendment to the Constitution of the United States?

Constitutional and Statutory Provisions Involved

1. This case involves the Eighth Amendment to the Constitution of the United States, which provides:

> "Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishment inflicted."

It also involves the Due Process Clause of the Fourteenth Amendment.

2. This case further involves the following provisions of the Code of Georgia:

Ga. Code Ann. §*26-1101 (1972)*

> "*Murder.* (a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.
>
> (b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.
>
> (c) A person convicted of murder shall be punished by death or by imprisonment for life."

Ga. Code Ann. §*26-1311 (1972)*

> "*Kidnapping.* (a) A person commits kidnapping when he abducts or steals away any person without

lawful authority or warrant and holds such person against his will.

(b) A person over the age of 17 commits kidnapping when he forcibly, maliciously, or fraudently leads, takes, or carries away, or decoys or entices away, any child under the age of 16 years against the will of the child's parents or other person having lawful custody.

A person convicted of kidnapping shall be punished by imprisonment for not less than one nor more than 20 years: provided that a person convicted of kidnapping for ransom shall be punished by life imprisonment or by death."

Ga. Code Ann. §26-1902 (1972)

"Armed robbery. A person commits armed robbery when, with intent to commit theft, he takes property of another from the person or the immediate presence of another by use of an offensive weapon. The offense robbery by intimidation shall be a lesser included offense in the offense of armed robbery. A person convicted of armed robbery shall be punished by death or imprisonment for life, or by imprisonment for not less than one nor more than 20 years."

Ga. Code Ann. §26-2001 (1972)

"Rape. A person commits rape when he has carnal knowledge of a female, forcibly and against her will. Carnal knowledge in rape occurs when there is any penetration of the female sex organ by the male sex organ. A person convicted of rape shall be punished by death or by imprisonment for not less than one nor more than 20 years. No conviction shall be had for rape on the unsupported testimony of the female."

Ga. Code Ann. §26-2201 (1972)

"Treason. A person owing allegiance to the State commits treason when he knowingly levies war against the State, adheres to her enemies, or gives them aid and comfort. No person shall be convicted of treason except on the testimony of two witnesses to the same overt act, or on confession in open court. When the overt act of treason is committed outside this State, the person charged therewith may be tried in any county in this State. A person convicted of treason shall be punished by death, or by imprisonment for life or for not less than 15 years."

Ga. Code Ann. §26-3301 (1972)

"Definition: punishment; continuing offense; jurisdiction.

A person commits hijacking of an aircraft when he (1) by use of force; or (2) by intimidation, by use of threats or coercion, places the pilot of an aircraft in fear of immediate serious bodily injury to himself or to another, causes the diverting of an aircraft from its intended destination to a destination dictated by such person. A person convicted of hijacking an aircraft shall be punished by death or life imprisonment. The offense of hijacking is declared to be a continuing offense from the point of beginning and jurisdiction to try a person accused of the offense of hijacking shall be in any county of Georgia over which the aircraft is being operated.

Ga. Code Ann. §26-3102 (1975 Supp.)

"Capital offenses; jury verdict and sentence. Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence

of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstance shall be necessary in offenses of treason or aircraft hijacking. The provisions of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty."

Ga. Code Ann. §27-2302 (1975 Supp.)[1]

"Recommendation to mercy. In all capital cases, other than those of homicide, when the verdict is guilty, with a recommendation to mercy, it shall be a recommendation to the judge of imprisonment for life. Such recommendation shall be binding upon the judge."

Ga. Code Ann. §27-2512 (1972)

"Electrocution substituted for hanging; place of execution. All persons who shall be convicted of a capital crime and who shall have imposed upon them the sentence of death shall suffer such punishment by electrocution instead of hanging."

Ga. Code Ann. §27-2514 (1975 Supp.)

"Sentence of death; copy for penitentiary superintendent. Time and mode of conveying prisoner to penitentiary. Expenses. Upon a verdict or judgment of death made by a jury or a judge, it shall be the duty of the presiding judge to sentence such convicted person to death and to make such sentence in writing, which shall be filed with the papers in the case against such convicted person, and a certified copy thereof shall be sent by the clerk of the court in which said sentence is pronounced to the superintendent of the State penitentiary, not less than 10 days prior to the time fixed in the sentence of the court for the execution of the same; and in all cases it shall be the duty of the sheriff of the county in which such convicted person is so sentenced, together with one deputy or more, if in his judgment, it is necessary, and provided that in all cases the number of guards shall be approved by the trial judge, or if he is not available, by the ordinary of said county in which such prisoner is sentenced, to convey such convicted person to said penitentiary, not more than 20 days nor less than two

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[1] At the time of petitioner's trial, Ga. Code Ann. §27-2302 provided:

"In all capital cases, other than those of homicide, when the verdict is guilty, with a recommendation to mercy, it shall be legal and shall mean imprisonment for life."

"When the verdict is guilty without a recommendation to mercy it shall be legal and shall mean that the convicted person shall be sentenced to death. However, when it is shown that a person convicted of a capital offense without a recommendation to mercy had not reached his seventeenth birthday at the time of the commission of the offense the punishment of such person shall not be death but shall be imprisonment for life."

Sec. 27-2302 was part of Georgia's capital-sentencing laws before *Furman* v. *Georgia*, and was not amended by the 1973 statute, whose provisions (Ga. Code Ann. §§26-3102, 27-2534.1(c)) were consistent with it. The present language is the result of a 1974 amendment. Ga. Laws, 1974, p. 353, Act. No. 854. See Editorial Comment to Ga. Code Ann. §27-2302 (1975 Supp.).

days prior to the time fixed in the judgment for the execution of such condemned person, unless otherwise directed by the Governor, or unless a stay of execution has been caused by appeal, granting of a new trial or other order of a court of competent jurisdiction, and the expense for transporting of said person to the penitentiary for the purpose of electrocution shall be paid by the ordinary of the county wherein the conviction was had, or the board of county commissioners, the county commissioner, or other person or persons having charge of the county funds, out of any fines on hand in the treasury of such county."

Ga. Code Ann. §27-2534.1 (1975 Supp.)

"*Mitigating and aggravating circumstances; death penalty.* (a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of the mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful ar-

rest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in section 27-2534.1 (b) is so found, the death penalty shall not be imposed."

Ga. Code Ann. §27-2537 (1975 Supp.)

"*Review of death sentences.* (a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court, within ten days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Georgia together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of Georgia.

(b) The Supreme Court of Georgia shall consider the punishment as well as any errors enumerated by way of appeal.

(c) With regard to the sentence, the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Code section 27-2534.1(b), and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(d) Both the defendant and the State shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of Georgia in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

(f) There shall be an Assistant to the Supreme Court, who shall be an attorney appointed by the Chief Justice of Georgia and who shall serve at the pleasure

of the court. The court shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. The Assistant shall provide the court with whatever extracted information it desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant.

(g) The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence.

(h) The office of the Assistant shall be attached to the office of the Clerk of the Supreme Court of Georgia for administrative purposes.

(i) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence."

Ga. Laws, 1973, p. 159, 162, Act. No. 74[3]

"At the conclusion of all felony cases heard by a jury, and after argument of counsel and proper charge from the court, the jury shall retire to consider a verdict of guilty or not guilty without any consideration of punishment. Where the jury or judge returns a

[3] This section was modified in certain respects by Ga. Laws, 1974, pp. 355-358, Act No. 854, which also provided that the section would be designated Ga. Code Ann. §27-2503. These modifications were insubstantial with respect to the trial of capital felonies.

verdict or finding of guilty, the court shall resume the trial and conduct a pre-sentence hearing before the jury or judge at which time the only issue shall be the determination of punishment to be imposed. In such hearing, subject to the laws of evidence, the jury or judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of *nolo contendere* of the defendant, or the absence of any such prior criminal convictions and pleas; provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The jury or judge shall also hear argument by the defendant or his counsel and the prosecuting attorney, as provided by law, regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument to the jury or judge. Upon the conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions and the jury shall retire to determine the punishment to be imposed. In cases in which the death penalty may be imposed by a jury or judge sitting without a jury, the additional procedure provided in Code section 27-2534.1 shall be followed. The jury, or the judge in cases tried by a judge, shall fix a sentence within the limits prescribed by law. The judge shall impose the sentence fixed by the jury or judge, as provided by law. If the jury cannot, within a reasonable time, agree to the punishment, the judge shall impose sentence within the limits of the law; provided, however, that the judge shall in no instance impose the death penalty when, in cases tried by a jury, the jury cannot agree upon the punishment. If the trial court

is reversed on appeal because of error only in the presentence hearing, the new trial which may be ordered shall apply only to the issue of punishment."

Ga. Code Ann. §27-2528 (1975 Supp.)

"*Sentence to life imprisonment or lesser punishment by judge on plea of guilty to an offense punishable by death.* Any person who has been indicted for an offense punishable by death may enter a plea of guilty at any time after his indictment, and the judge of the superior court having jurisdiction may, in his discretion, during term time or vacation, sentence such person to life imprisonment, or to any punishment authorized by law for the offense named in the indictment. Provided, however, that the judge of the superior court must find one of the statutory aggravating circumstances provided in Code section 27-2534.1 before imposing the death penalty except in cases of treason or aircraft hijacking."

Statement of the Case

Petitioner Troy Leon Gregg was indicted by a Gwinnett County, Georgia, grand jury, upon two counts of murder and two counts of armed robbery for the November 21, 1973 killings of Fred Edward Simmons and Bob Durwood ("Tex") Moore. The indictments alleged that Gregg "unlawfully with malice aforethought" killed each of the victims "by shooting [him] . . . with a certain pistol" (T. 424, 425), and that "with the intent to commit theft" he did "take from the person" of the two victims "A red and white 1960 Pontiac, Florida Tag Number 7W85381" and "Four hundred dollars" "by the use of a certain pistol, . . . an offensive weapon . . . ." (T. 424, 425).

On November 21, 1973 petitioner was hitchhiking from St. Cloud, Florida to his home in Ashville, North Carolina, accompanied by one Floyd Ralford "Sam" Allen. (T. 122, 309-311). They were picked up just outside of St. Cloud by two men, Fred Simmons and Bob Moore, in a 1960 Ford. (T. 312.) Though it was early morning, Moore and Simmons had been drinking, and after a few miles asked petitioner Gregg to drive. (T. 313.)

Gregg complied, but after some distance, the Ford broke down. (T. 313.) A passing Florida Highway Patrolman, Daniel James Cobb, saw the disabled vehicle and called a wrecker. Leaving Gregg and Allen at the site of the breakdown, the patrolman then took Simmons and Moore to a used car dealer in nearby Winter Garden, where Simmons purchased another car, a 1960 red and white Pontiac. (T. 209-210.) Trooper Cobb noticed that Moore had what "looked like a considerable amount of money" at the time of the purchase. (T. 212.)

Simmons and Moore returned to pick up Gregg and Allen, and the four continued north, again with Gregg driving. (T. 314.) In northern Florida they encountered another hitchhiker, Dennis Weaver, who rode with them until they reached his destination, Atlanta, at approximately eleven o'clock that evening. (T. 120-130.) Weaver testified that during this time there was no evidence of hostility among the men in the car, though Moore and Simmons were drinking heavily (T. 125-126), and though he was frightened by Simmons' and Moore's talk about their jail experiences and by "the situation" (T. 146-147).

After letting Weaver out, the four men continued northward into Gwinnett county to the intersection of I-85 and Georgia Highway 20, where Moore and Simmons asked Gregg to stop the car so they could relieve themselves.

(T. 319.) Their bodies were found there early the next morning. (T. 221.) Autopsies showed that both men had died of gunshot wounds to the head from a small caliber pistol. (T. 92, 96.) Moore had been shot once in the right cheek and once in the back of the head (T. 92), Simmons once near the right temple (T. 97). Both men had several bruises and abrasions of unknown origin about the face and head (T. 95, 107-110),[3] and both bodies had blood alcohol contents indicating that the two men were heavily intoxicated at the time of death (T. 101).

On November 23, Dennis Weaver read in an Atlanta newspaper about the discovery of the dead men and contacted the Gwinnett County Police Department. (T. 131-133.) He told the police of his contact with the four men two days before, gave them a description of Gregg and Allen and of Simmons' Pontiac, and gave them his impression that their destination was Ashville, North Carolina. (T. 134, 239.) Based on this information the police broadcast a description of the car and suspects (T. 239), which resulted in petitioner's arrest at three o'clock the

[3] Dr. James Bryan Dawson, who performed the autopsies, was unable to determine whether these minor injuries were incurred before or after the gunshot wounds, though as to Simmons he was able to say they were inflicted "not earlier than two to three hours before" death. (T. 104-105, 109-110.) He noted that the wounds were all "consistent with the face of the subject having been dragged or pushed along . . . a surface" similar to the embankment next to which the bodies were found. (T. 112.) He agreed that some of the injuries, to Simmons, at least, could have resulted from a fight (T. 102, 105), but concluded that they "were probably sustained from a fall into this ditch." (T. 105.) Dr. Dawson also testified that he found dried blood on Moore's right hand that "was not like the remainder of the dried blood that was found on the face . . . or around the body" (T. 106), but which he did not analyze (*ibid.*), though he "particularly looked for signs of injuries to the hands which might have suggested that there was some sort of altercation or . . . defense . . . and found nothing on either one of the subject's hands, which suggested that this might have taken place" (T. 110).

next afternoon. (T. 164-165.)[4] At the time of his arrest Gregg was driving the 1960 Pontiac which Simmons had purchased (T. 165, 169), and had in his pocket $107.00 in cash and a pistol later shown to be that which killed Moore and Simmons (*ibid.*). A search of the car incident to this arrest produced Simmons' bill of sale for the car. (T. 168.)

Gregg was given *Miranda* warnings about five minutes after he was stopped (T. 170-171), and signed a written waiver of his rights at 3:17 p.m. (T. 516). He was not interrogated until eleven o'clock that evening, when he told Detective Bert H. Blannott of the Gwinnett County Police that "he understood his rights" (T. 281),[5] and made a partially exculpatory statement. He admitted shooting Simmons and Moore, but claimed to have done it in self-defense. (T. 282-283.) In the statement, which he read and signed (T. 322), Gregg said that Moore and Simmons were "going to put me and Sam out" and "wouldn't give us our clothes and stuff and we got in a fight." (T. 518.)

> "Fred smacked me down a bank and then him and Tex both jumped on Sam. Fred had some kind of pipe and I backed up and fell in the ditch again. One of them had a knife and I wasn't about to let either one of them cut me. . . . I shot Fred to keep him off of me and I shot Tex twice. Then we took about four or five hundred dollars off them and left in their car."

[4] The constitutionality of this warrantless arrest for "investigation" (T. 183), and the admissibility of its fruits, was the subject of considerable dispute at trial (T. 183-203), and a ground of Gregg's appeal.

[5] The *Miranda* warnings that had been given prior to 3:17 p.m. were not repeated before the 11:00 p.m. interrogation. (T. 297.)

(*Ibid.*) Shortly after the conclusion of his statement, however, when Ashville police officer William Gibson asked Gregg "why he shot these people," Gregg answered "by God I wanted them dead" (T. 379).

At approximately one o'clock on November 25, Gregg (together with Allen) was removed from Ashville to Lawrenceville, Georgia, by the Gwinnett County Police and District Attorney. (T. 284.) At approximately 5:00 they stopped at the scene of the killings "to establish in our own minds with the help of the defendants just exactly [what] had taken place." (T. 290.) All of the parties got out of the cars, and Detective Blannott asked Allen, in Gregg's presence, what had happened. (T. 286.) According to Blannott's testimony:

> "Sam [Allen] told us as soon as [Simmons and Moore] . . . got out, Troy [Gregg] turned around and told him, he said, get out, we're going to rob them. Sam told us that he got out and walked toward the back of the car and looked around and could see Troy at the car, with a gun in his hand, laying up on the car, so he could get a good aim, the two men had gone down the bank and had relieved themselves and as they were coming back up the bank, according to Say [sic], Troy fired three shots, one of the men fell, the other staggered, Troy then circled back around the back, or rear of the car and approached the two men, both of which were now laying in the ditch. He placed the gun to ones [sic] head and pulled the trigger then went quickly to the other one and placed the gun to his head and pulled the trigger again, he then took the money, whatever contents were in their pockets, he told Sam, to get in the car and they drove away."

(T. 287.) Blannott testified that Gregg was then asked "if that was how it happened" and said "yes, it was." (*Ibid.*)

> "Chief Crunkleton then asked him . . . 'you mean you shot these men down in cold blooded murder just to rob them' and Troy replied, 'yes,' and Chief asked him why and he said he didn't know."

(T. 288.)

Petitioner's trial began February 4, 1974. A jury was selected,[6] and four days of proceedings were held. The State's evidence is summarized above.[7] Petitioner was the sole witness in his own behalf. He testified at trial, as he had claimed when first interrogated following his arrest, that he had shot Moore and Allen in self-defense and defense of Allen. (T. 320.)[8] On cross-examination the State produced a letter written by Gregg to Allen asking Allen to renounce his previous statements and provide a "Statement for you" containing a version of the killings consistent with Gregg's trial testimony. (T. 350-354, 521-528.) Gregg

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[6] Three veniremen were challenged by the state and excused by the court without objection because of their affirmative answers when asked if they would "vote against imposition of the death penalty without regard to any evidence that might be developed at the trial of the case." (T. 2, 3, 31.)

[7] "Sam" Allen did not testify at Gregg's trial, but his statement in Gregg's presence was recounted (T. 286), and he appeared in court to be identified (T. 138). The murder charges pending against him at the time were "nol prossed" when he pled guilty to the robbery counts, receiving concurrent twenty-year sentences, six weeks later. See *State* v. *Floyd Allen,* Gwinnett County Superior Court, Indictment #9475.

[8] Petitioner admitted making the signed statement containing his earlier claim of self-defense (T. 322), but denied agreeing with Allen's version of the facts at the scene of the killings. (T. 323, 350). He also denied Officer Gibson's testimony that he had said he shot Moore and Simmons because "I wanted them dead." (T. 381.) He said that he had not taken any money from the dead men (T. 346), but suggested that Allen may have done so. He testified that Allen had paid for everything that the two men had purchased after the killings (T. 329-330), and that Gregg had been given the money found on him at the time of his arrest as repayment of a loan after his return to Ashville. (T. 331-336.)

admitted writing parts of the letter but denied writing others. (*Ibid.*) In rebuttal the State called a document examiner who testified that the whole letter was written by Gregg. (T. 361.)

The trial judge submitted the murder charge to the jury on both felony-murder and non-felony-murder theories. (T. 428-429.) It instructed on the issue of self-defense raised by petitioner's testimony (T. 430-431) but declined to instruct on manslaughter (T. 451). On the murder counts, it therefore authorized the jury to return verdicts of guilty or not guilty (T. 441); and on the robbery counts it authorized verdicts of guilty of armed robbery, guilty of robbery by intimidation, or not guilty (*Ibid.*). The jury returned verdicts of guilty on all four counts. (T. 453.)

A pre-sentence hearing was conducted the same day. No evidence was offered at that hearing (T. 459), but counsel for both sides made lengthy arguments, dealing generally with the propriety of capital punishment under the circumstances and with the weight of the evidence of guilt. (T. 459-477.)

The court charged the jury that it could recommend either a death sentence or a prison sentence upon each count. (T. 478.) It further charged that, in order to recommend a death sentence upon any count, the jury first had to find true beyond a reasonable doubt one of three aggravating circumstances:

> "One—That the offense . . . was committed while the offender was engaged in the commission of two other capitol [sic] felonies, to wit [the armed robbery or murder of Simmons and Moore]. . . .
>
> Two—That the offender committed the offense . . . for the purpose of receiving money and the automobile described in the indictment.

> Three—The offense . . . was outrageously and wantonly vile, horrible and inhuman, in that [it] . . . involved the depravity of the mind of the defendant."

(T. 478, 479.) The jury was told that it could consider "the facts and circumstances in mitigation and aggravation." (T. 480.) "Mitigating circumstances" were defined as

> "those which do not constitute a justification of [sic] excuse for the offense in question, but which, in fairness and mercy maybe [sic] considered as a extinuating [sic] or reducing the degree of moral culpability of punishment [sic]."

(T. 480.) "Aggravating circumstances" were defined as

> "those which increase the guilt or innormity [sic] of the offense or add to its injurious consequences."

(Ibid.)

The jury recommended a death sentence on each count. (T. 483-485.) It found true, as to each count, all but the third "aggravating circumstance." (*Ibid.*) The court accordingly imposed four death sentences upon petitioner.

How the Federal Question Was Raised and Decided Below

In the Supreme Court of Georgia, petitioner's Enumeration of Error No. 3 asserted that:

> "The lower Court erred in submitting to the jury the issue of punishment by death in that punishment by death constitutes cruel and inhumane punishment contrary to the provisions of the Eighth and Fourteenth Amendments to the Constitution of the United States."

On the authority of *Coley* v. *State,* 231 Ga. 829, 204 S.E. 2d 612 (1974); *House* v. *State,* 232 Ga. 140, 205 S.E.2d 217 (1974) and *Eberheart* v. *State,* 232 Ga. 247, 206 S.E.2d 12 (1974), a majority of the Supreme Court of Georgia affirmed petitioner's sentences of death for the crime of murder, *Gregg* v. *State,* 233 Ga. 117, 210 S.E.2d 659 (1974), one judge dissenting on the ground that the Georgia death penalty statutes are unconstitutional, *id.* at 668 (opinion of Mr. Justice Gunter, concurring and dissenting). The death sentences imposed for the crime or armed robbery were vacated on the grounds that the penalty was rarely imposed for that offense and that the jury improperly considered the murders as aggravating circumstances for the robberies after having considered the armed robberies as aggravating circumstances for the murders. *Id.* at 667.

An application for rehearing, in which petitioner again challenged the constitutionality of his death sentences, was denied. Order dated October 29, 1974.

Summary of Argument

I

Georgia's 1973 capital punishment statute provides a bifurcated trial procedure for selecting some convicted capital offenders to be killed while others live. The statute has been upheld by the Supreme Court of Georgia over the objection that it "permits the exercise of a discretion that extinguishes one man's life and permits another man to live, both of whom have committed exactly the same crime." *Coley* v. *State,* 231 Ga. 829, 204 S.E.2d 612, 620 (opinion of Mr. Justice Gunter, concurring and dissenting). Experience to date in the administration of the statute confirms that life sentences and death sentences may be and are imposed "with no meaningful basis for distinguishing" the people who get them. *Furman* v. *Georgia,* 408 U.S. 238, 313 (1972) (concurring opinion of Mr. Justice White). Detailed examination of the new statute and its use demonstrates that, far from assuring regularity, it merely perpetuates the arbitrariness condemned in *Furman.*

The explicit capital sentencing discretion is itself only one of several mechanisms by which an arbitrary fraction of death-eligible offenders is selected to be actually put to death. Prosecutorial charging and plea-bargaining discretion, jury discretion to convict of one or another amorphously distinguished "capital" or non-capital crime, and gubernatorial discretion to grant or withhold clemency are all equally uncontrolled and uncontrollable. In its parts and as a whole, the process is inveterately capricious. To inflict death through such a process is to inflict unconstitutional cruel and unusual punishment within the fundamental historical concerns of the Eighth Amendment.[9]

II[10]

The continuation of arbitrariness in post-*Furman* capital punishment schemes is not mere happenstance. The death penalty is too cruelly intolerable for our society to apply it regularly and even-handedly; and it is inherently too purposeless and irrational to be applied selectively on any reasoned, non-indivious basis. None of the justifications advanced to support the cruelty of killing a random smattering of prisoners annually survives examination in the light of the realities of this insensate lottery; and none

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[9] These concerns are documented in the Brief for Petitioner in *Fowler* v. *North Carolina,* No. 73-7031, at pp. 26-45, and we do not repeat that documentation in the present brief.

[10] This point incorporates by reference the submissions made in petitioners' briefs in *Fowler* v. *North Carolina,* No. 73-7031 and *Jurek* v. *Texas,* No. 75-5394.

begins, of course, to justify the killing of any particular human being while his indistinguishable counterparts are spared in numbers that attest to our collective abhorrence of what we are doing to an outcast few.

I

Introduction

In 1972, this Court held "that the imposition and carrying out of the death penalty" in two Georgia cases "constitute[d] cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *Furman* v. *Georgia*, *supra*, 408 U.S. at 239.[11] Contemporaneously with that decision, the Court summarily vacated death sentences in a number of other Georgia cases on the authority of *Furman* —sentences imposed under the pre-1969 sentencing system involved in the *Furman* case itself,[12] under the slightly different system created by the 1968 Criminal Code of Georgia,[13] and under a bifurcated trial procedure enacted in 1970.[14] The Georgia Supreme Court subsequently recognized that *Furman* had invalidated all of the State's death penalty laws.[15]

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[11] The companion Georgia case of *Jackson* v. *Georgia* was decided by the same order.

[12] *Arkwright* v. *Georgia*, 408 U.S. 936 (1972); *Miller* v. *Georgia*, 408 U.S. 938 (1972); *Walker* v. *Georgia*, 408 U.S. 936 (1972); *Cummings* v. *Georgia*, 408 U.S. 935 (1972); *Lee* v. *Georgia*, 408 U.S. 936 (1972); *Manor* v. *Georgia*, 408 U.S. 935 (1972); *Park* v. *Georgia*, 408 U.S. 935 (1972); *Sullivan* v. *Georgia*, 408 U.S. 935 (1972); *Thacker* v. *Georgia*, 408 U.S. 936 (1972).

[13] *Henderson* v. *Georgia*, 408 U.S. 938 (1972).

[14] *Jackson* v. *Georgia*, 409 U.S. 1122 (1972); *Williams* v. *Georgia*, 408 U.S. 936 (1972).

[15] *See, e.g., Sullivan, et al.* v. *State*, 229 Ga. 731, 194 S.E.2d 411 (1972); *Mitchell* v. *Smith*, 229 Ga. 781, 194 S.E.2d 414 (1972); *Massey* v. *State*, 229 Ga. 846, 195 S.E.2d 28 (1972); *Grantling* v. *State*, 229 Ga. 746, 194 S.E.2d 405 (1972); *Callahan* v. *State*, 229 Ga. 737, 194 S.E.2d 431 (1972); *Sirmans* v. *State*, 229 Ga. 743, 194 S.E.2d 476 (1972); *McCrary* v. *State*, 229 Ga. 733, 194 S.E.2d 480 (1972); *Jackson* v. *State*, 230 Ga. 181, 195 S.E.2d 921 (1973); *Wilburn* v. *State*, 230 Ga. 675, 198 S.E.2d 857 (1973). In *Watson* v. *State*, 229 Ga. 787, 194 S.E.2d 407 (1972), the Court stated flatly that "the imposition of the death penalty under present Georgia statutes is unconstitutional." 194 S.E.2d at 407.

The Georgia Legislature reacted in 1973 by enacting a capital sentencing scheme which requires that one or more specified "aggravating circumstances" be found as a precondition to the imposition of a death sentence.[16] Georgia Laws 1973, p. 159, No. 74 (effective March 28, 1973). After a jury or a judge renders a verdict or finding of guilty

[16] No "aggravating circumstances" are required, however, to support a death sentence for the crimes of treason and aircraft hijacking. The death penalty laws enacted in 1973 are set forth at pages 5-14 *supra*. Section 26-3102 was modified by the addition of the italicized passages:

> "*Capital offenses; jury verdict and sentence.* Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes *a finding of at least one statutory aggravating circumstance and* a recommendation that such sentence be imposed. Where a *statutory aggravating circumstance is found and* a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case *makes a finding of at least one statutory aggravating circumstance and* recommends the death sentence in its verdict, the court shall not sentence the defendant to death, *provided that no such finding of statutory aggravating circumstance shall be necessary in offenses of treason or aircraft hijacking.* The provision of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty."

Section 26-3102 and 27-2534.1 provided for consideration of aggravating and mitigating circumstances, and §27-2534.1(b) set forth some of the aggravating circumstances to be considered. Section 27-2537 provided for appellate review of sentences of death. Section 27-2528 dealt with sentencing following a plea of guilty to an offense punishable by death.

or after a plea of guilty to the offenses of murder, armed robbery, rape, kidnapping, treason or aircraft hijacking,[17] a pre-sentence hearing is to be conducted before the jury or judge. At this hearing, "the jury or judge shall hear additional evidence in extenuation, mitigation and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of *nolo contendere* of the defendant, or the absence of such prior convictions and pleas." Ga. Laws 1973, p. 162, Act. No. 74.[18] The State may present only such evidence in aggravation as it has made known in advance to the defendant. Ga. Laws 1973, p. 162, Act. No. 74.

The judge is to consider or to include in his instructions to the jury "any mitigating circumstances or aggravating circumstances otherwise authorized by law and . . . statutory aggravating circumstances which may be supported by the evidence." Ga. Code Ann. §27-2534.1(b). The "statutory aggravating circumstances" are:

> "(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.
>
> (2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or

[17] These crimes—and the crime of capital perjury, see former Ga. Code Ann. §26-2401 (1972)—carried a possible death penalty prior to the 1973 legislation; their definitions were not changed in 1973.

[18] The statutory language governing proof of aggravating and mitigating circumstances at pre-sentence hearings in capital trials was not changed in 1973. Compare former Ga. Code. Ann. §27-2534 (1972).

> aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.
>
> (3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.
>
> (4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.
>
> (5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.
>
> (6) The offender caused or directed another to commit or committed murder as an agent or employee of another person.
>
> (7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.
>
> (8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.
>
> (9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.
>
> (10 The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another."

Ibid. Additional "aggravating circumstances otherwise authorized by law" are not identified. "Mitigating circumstances" are not enumerated or defined.[19]

The jury *may*—but need not—impose a death sentence when it finds beyond a reasonable doubt one "statutory aggravating circumstance." Ga. Laws 1973, p. 162, Act. No. 74. For to condemn a defendant, it must also make a "recommendation of death."[20] Ga. Code Ann. §27-2534.1(c). See Ga. Code Ann. §26-3102.[21]

Provision is made for the filing of a standardized form "report" by the trial judge in capital cases where the death penalty is imposed and for direct automatic appeal to the Georgia Supreme Court. Ga. Code Ann. §27-2537. General guidelines for review by that court are provided,[22] and the court is empowered to affirm the death sentence or to set it

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[19] The Act does, however, provide that evidence of the absence of prior criminal convictions or pleas may be heard at the penalty trial. Ga. Laws 1973, p. 162, Act No. 74.

[20] See pages 33-34, *infra*.

[21] See note 16, *supra*.

[22] The Court is directed to consider "the punishment as well as any errors enumerated by way of appeal" in a case where a death sentence has been imposed, and to determine:

> "(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and
>
> (2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Code section 27-2534.1(b), and
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

Ga. Code Ann. §27-2537(c). If the court affirms a death sentence, it "shall include in its decision a reference to those similar cases which it took into consideration." Ga. Code Ann. §27-2537(e).

aside and remand the case for resentencing. *Ibid.* Executive discretion to grant or deny clemency in cases where a death sentence has been imposed remains unregulated.

In the following Part II we will establish, through an analysis of the unquestionably discretionary procedures by which Georgia capital defendants are still prosecuted and sentenced, that the constitutional infirmities condemned in *Furman* v. *Georgia* remain. *Cf. Lane* v. *Wilson,* 307 U.S. 268, 275 (1938). In Part III we will address the question whether the execution of a human being who has been condemned through such procedures can be thought consistent with Eighth Amendment standards of decency.

II

The Arbitrary Infliction of Death

A. *At the Pre-Sentence Hearing.*

1. Georgia's 1973 Death Penalty Legislation Is Explicitly Discretionary.

We start with the observation that Georgia's post-*Furman* capital sentencing procedure remains avowedly discretionary. In *Coley* v. *State,* 231 Ga. 829, 204 S.E.2d 612 (1974), the Supreme Court of Georgia addressed the constitutionality of the 1973 death penalty laws, and said:

> "The essential question is not whether our new death statute permits the use of some discretion, because admittedly it does, but, rather, whether the discretion to be exercised is controlled by clear and objective standards so as to produce non-discriminatory application. After all, some discretion is inherent in any system of justice, from arrest to final review."

Id. at 615. The Court concluded that "the system of dispensation of the death penalty provided by the statute does

not offend the principles of decision of the U.S. Supreme Court in *Furman* and *Jackson*," *id.* at 616, because:

> "[f]irst, the new statute substantially narrows and guides the discretion of the sentencing authority to impose the death penalty and allows it only for the most outrageous crimes and those offenses against persons who place themselves in great danger as public servants. In addition, the new statute provides for automatic and swift appellate review to insure that the death penalty will not be carried out unless the evidence supports the finding of one of the serious crimes specified in the statute. The statute also requires comparative sentencing so that if the death penalty is only rarely imposed for an act or it is substantially out of line with sentences imposed for other acts it will be set aside as excessive. And, finally, the statute requires this court to make certain the record does not indicate that arbitrariness or discrimination was used in the imposition of the death sentence."

The following sections demonstrate, however, that sentencing discretion is neither confined by the provisions of the new statute nor regularized by the process of appellate re-evaluation.

2. The Consideration of Aggravating and Mitigating Circumstances Does Not Control Arbitrariness in the Georgia Capital Sentencing Process.

The process of considering "aggravating" and "mitigating" circumstances does not—and was not intended to—confine the unfettered power of the sentencer to condemn or spare any capital defendant. This is clear for several reasons.

a. *The failure to identify circumstances under which a death penalty is precluded.*

The statute does not preclude a death sentence in any potentially capital case. True, a statutory "aggravating circumstance" is legally required to be found before a defendant can be sentenced to die; and it is doubtless also true that most of the enumerated aggravating circumstances—despite their multiplication,[23] imprecision[24] and breadth[25]—have some limits. But the reach of sub-

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[23] E.g. Ga. Code Ann. §27-2534.1(b)(1) (the defendant had "a prior record of conviction for a capital felony . . . or a substantial history of serious assaultive criminal convictions"); (2) ("the offender was engaged in the commission of another capital felony, or aggravated battery, or . . . burglary or arson in the first degree"); (3) ("The offender . . . knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person."); (4) (the murder was committed "for the purpose of receiving . . . any . . . thing of monetary value."); (6) ("The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.").

[24] See pages 35-36, *infra*.

[25] Consider, for example, Ga. Code Ann. §27.2534.1(b)(4) which makes it an aggravating circumstance that murder is committed "for the purpose of receiving money or any other thing of monetary value." This language may sound in contract-killing: at least that is the way the commentators have read the phraseology. Browning, *The New Death Penalty Statutes: Perpetuating a Costly Myth*, 9 Gonzaga L. Rev. 651, 700 n.209 (1974); *Note, Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 Harv. L. Rev. 1600, 1701 n.72 (1974). But contract-killings in Georgia are already covered by Ga. Code Ann. §27.2534.1(b)(6); and the Georgia Supreme Court has affirmed findings of the aggravating circumstances of "monetary value" in cases such as petitioner's, *Gregg* v. *State*, 233 Ga. 117, 210 S.E.2d 659, 667 (1974), and *Jarrell* v. *State*, 234 Ga. 410, 216 S.E.2d 258, 269 (1975), which were assuredly not contract killings. Nor can subsection 27.2534.1(b)(4) be limited even to the ordinary sort of robbery-murder case in which the robber uses an offensive weapon to achieve his purpose, for *those* cases are covered by subsection 27.2534.1(b)(2). The upshot is that no restriction remains available to limit the evident expansiveness of the words "for the purpose of receiving . . . any . . . thing of monetary value."

section (7), which authorizes a death penalty if the crime was:

> "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim"

is, on its face, limitless. Surely any capital crime could be found to involve "depravity of mind." And surely any murder could be found to have involved an "aggravated battery to the victim." [26] Subsection 27-2534.1(b)(2), which makes the concurrent commission of "another capital felony" an aggravating circumstance, functions similarly to aggravate virtually any rape, for the forcible detention and abduction which are usually necessary to the completion of the crime are sufficient to constitute kidnapping, "another capital felony." [27] Since aggravating circumstances can be found in virtually any case of murder or rape,[28] and since the presence of mitigating circumstances does not legally preclude a death sentence,[29] the judge or jury predisposed—for whatever reason—to inflict capital punishment upon any particular defendant may essentially do so at will.

[26] "Aggravated battery" is statutorily defined as:

> "maliciously *caus[ing]* . . . *bodily harm to another* by depriving him of a member of his body, or *by rendering a member of his body useless,* or by seriously disfiguring his body or a member thereof."

Ga. Code Ann. §26-1305 (1972) (emphasis added). Any doubt about the breadth of "aggravated battery" is dispelled by *Mitchell* v. *State,* 234 Ga. 160, 214 S.E.2d 900 (1975), in which the same term from Ga. Code Ann. §27-2534.1(b)(2) was held applicable to the shooting of two victims in a grocery store holdup. Cf. Professor Black's comments on this aspect of the Georgia statute:

> "Since Georgia law defines an 'aggravated battery' as a battery (i.e., attack on the person) which deprives the victim of a member, or of the use of a member, or disfigures him, the concept is a preposterous one when applied to murder; either it is always present in murder, which deprives the victim of the use of all his members, or else it functions absurdly as an 'aggravating circumstance' since it can make little difference to a dead man whether he can lift his right leg."

BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE, 66 (1974).

[27] Georgia Code Ann. §26-1311(a) provides that "[a] person commits kidnapping when he abducts or steals away any person without lawful authority or warrant and holds such person against his will." Kidnapping is made capital when, *inter alia,* "the person kidnapped shall have received bodily injury"—an element obviously made out in any rape case.

[28] The term "torture" as used in subsection 27-2534.1(b)(7) seems also to have no perceptible boundaries. In *Floyd* v. *State,* 233 Ga. 280, 210 S.E.2d 810 (1974), the court affirmed a jury finding that a robbery involved "torture" where the victims were each tied up and shot twice in the head, killing them both. *Id.* at 812.

[29] *See, e.g., Moore* v. *State,* 233 Ga. 861, 213 S.E.2d 829, 832 (1975), in which the trial court found some mitigating circumstances, the appellate court "considered" several more, and a death sentence was nonetheless imposed and affirmed.

[30] Of course, it is possible that in some cases juries will not understand this and will believe that a death sentence must be imposed when "aggravating circumstances" are found. See, *e.g.,*

b. *The failure to identify circumstances under which a sentence of death is warranted.*

The discretion to decline to impose the death penalty in any capital case is absolute. For a death sentence cannot be pronounced unless the jury not only finds a "statutory" aggravating circumstance, but also "recommends the death sentence in its verdict." Ga. Code Ann. §26-3102 (1975 Supp.). Although one or more of the ten statutory aggravating circumstances may be present and acknowledged, the fact-finder, whether it be judge or jury, can still decline to impose the death penalty. Ga. Laws 1973, p. 162, No. 74. Section 27-2534.1(c) merely says that the death penalty shall *not* be imposed unless at least one of the statutory aggravating circumstances is present.[30] *Coley*

v. *State*, 231 Ga. 829, 204 S.E.2d 612, 620 (1974) (opinion of Mr. Justice Gunter, concurring and dissenting).

The statute does not specify or define "mitigating circumstances," and the sentencer is therefore free in any case to consider *anything* a mitigating factor which inspires mercy. There is obviously no case at all in which the sentencer might not conclude that some factual element was present which entitled the defendant to a milder sentence than death. But let us assume, implausibly, that some case could be found in which literally *nothing, no* circumstance of the crime or criminal, could be found to speak against extinction. The sentencer may nevertheless—notwithstanding that it finds an aggravating circumstance or circumstances and no mitigating circumstances—choose to spare this defendant's life.

Nowhere in the statute is there any "mandate [for] the [death] penalty in any particular class or kind of case (that is, legislative will is not frustrated if the penalty is never imposed)." *Furman* v. *Georgia, supra,* 408 U.S. at 311 (concurring opinion of Mr. Justice White). Instead the statute baldly "delegates to judges and juries the decision as to those cases, if any, in which the penalty will be utilized." *Ibid.*

House v. *State*, 232 Ga. 140, 205 S.E.2d 217 (1974), where a confused jury asked the court "what the difference is for life and death" (Transcript of Proceedings 621), and was recharged that "if you find that this aggravating circumstance existed . . . then you would be authorized to consider imposing a sentence of death . . ." (*id.* at 622-623). The jury then returned a verdict saying "We, the jury, fix the punishment of the defendant at death on counts one and two, *since* the offense of murder was outrageously or wantonly vile and horrible and that it involved torture to the victim and depravity of mind." (*id.* at 631, emphasis added).

c. *The indeterminateness of the aggravating circumstances.*

The particular "aggravating circumstances" specified in the statute are amorphous, intangible, elusive, and open to differing interpretations in like cases depending upon the subjective impressions or instincts of the sentencer. Concepts such as a "substantial history of serious assaultive criminal convictions," Ga. Code Ann. §27-2534.1(b)(1), the creation of a "great risk of death to more than one person," Ga. Code Ann. §27-2534.1(b)(3), and the use of a "weapon or device which would normally be hazardous to the lives of more than one person" Ga. Code Ann. §27-2534.1 (b)(3), are incapable of precise interpretation or application, and confer broad license upon particular judges and juries to define their content. As we have noted, reference to murders which are "outrageously or wantonly vile, horrible or inhuman in that [they] . . . involved torture, depravity of mind, or an aggravated battery to the victim," Ga. Code Ann. §27-2534.1(b)(7), provides no direction at all.

> "The best one can say is . . . the listed 'aggravating circumstances' are in part (and every part is vital, for only *one* need be 'found' to support a death sentence) exceedingly vague."

BLACK, *op. cit. supra* note 26, at 66.

Moreover, the statutory list of aggravating circumstances is not exclusive. At least one "statutory aggravating circumstance" is required to be found in order to support a death sentence, Ga. Code Ann. §26-3102; but after one such circumstance has been found, the jury's or the judge's ultimate life-or-death decision is to be made upon consideration not only of "any of the . . . statutory aggravating circum-

stances which may be supported by the evidence," but also of "any . . . aggravating circumstances otherwise authorized by law." Ga. Code Ann. §27-2534.1(b). There is, in short, no limit to what particular juries or judges may choose to treat as "aggravating." It is little wonder that the Georgia Supreme Court has characterized the capital sentencing decision as "the weighing of imponderables." *Prevatte* v. *State*, 233 Ga. 929, 214 S.E.2d 365, 368 (1975).

d. *The scope of the pre-sentence hearing.*

There is also little limitation on the nature or the scope of judicial instruction, evidence, and argument that may be presented and considered at the pre-sentencing hearing. We have just seen that the trial judge "shall include" in his instructions "any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the statutory aggravating circumstances which may be supported by the evidence." Ga. Code Ann. §27-2534.1(b). The trial judge is also to give the jury such "statutory instructions" as he determines "to be warranted by the evidence." Ga. Code Ann. §27-2534.1(c). He

> "is thereby allowed, in these cases, to choose for consideration mitigating or aggravating circumstances *outside* those listed in the Act, and, where a jury hears the trial, to include in his instructions references to any such circumstances which *he* may *consider* to be supported or *warranted* by the evidence *and*, possibly, which he may *deem worthy* of consideration by the jury." [31]

[31] Comment, *Constitutional Law—Capital Punishment*—Furman v. Georgia *and Georgia's Statutory Response*, 24 MERCER L. REV. 891, 933 (1973) (original emphasis).

Evidence is nowise restricted:

> " 'The bifurcated trial was created to withhold matters inadmissible on the issue of guilt or innocence from the jury until that issue has been determined. The statute is clear that the pre-sentence hearing is for additional evidence. . . .'
>
> "In *Williams* v. *State*, 226 Ga. 140(1) (173 S.E.2d 182) (1970, a case which was retried on the question of sentence only, it was held that a jury could consider the defendant's 'alibi' to mitigate his sentence. . . . The 1974 Act, supra, did not change the evidence which would be admissible at such hearing. . . .
>
> ". . . In *Dudley* v. *State*, 228 Ga. 551, 561 (186 S.E.2d 875) (1972), a majority of this court held that the issue to be decided at the pre-sentence hearing calls for different evidence from that on the trial which determines guilt or innocence. The *Dudley* decision held that evidence of general bad character could be admitted in those cases when the defendant had been notified prior to trial that such evidence would be presented."

Brown v. *State*, Ga. Sup. Ct. No. 30362, decided December 2, 1975, slip. op. at 5-6.

And argument is as unrestricted as evidence.[32] The general rule in Georgia is that "an attorney may make almost

[32] The only restriction is that the prosecutor may not seek to diffuse the responsibility of the jury by mentioning such matters as the possibility of appellate review in the case of a death sentence or of future parole board action in the case of a life sentence. *Prevatte* v. *State*, 233 Ga. 929, 214 S.E.2d 365 (1975); *Tamplin* v. *State*, 235 Ga. 20, 218 S.E.2d 779, 782-783 (1975) (dictum). Even with regard to this rule, considerable latitude is allowed. *Ibid.; Coker* v. *State*, 234 Ga. 555, 216 S.E.2d 782 (1975).

any form of argument he desires";[33] and there is no doubt that this rule applies in death-sentencing hearings.[34] In *Mason* v. *State,* Ga. Sup. Ct. No. 30338, decided January 7, 1976, slip op. at 7, the court held that it was permissible for the district attorney to argue that: "'we must keep our streets safe for society. This man has killed once before and if we let him live, he may get out on our streets and kill again. We must show to all people coming into this county that the citizens of this county will not put up with this kind of conduct." In *Chenault* v. *State,* 234 Ga. 216, 215 S.E.2d 223, 229 (1975), the district attorney was permitted to argue: "We can't have these reporters writing that a life sentence is all you get in this county." Obviously, these arguments have nothing to do with aggravating and mitigating circumstances in the particular case before the jury. They are simply calls to make an example of the defendant, and they point up—just as they exploit—the jury's unlimited discretionary power. The prosecutor in *Coker* v. *State,* 234 Ga. 555, 216 S.E.2d 782, 796 (1975), summed up aptly: "The State of Georgia and you as citizens have the right to put someone to death. That's what you've got to decide." But

[33] *Walker* v. *State,* 5 Ga. App. 606, 63 S.E. 142 (1908). *See, e.g., Ramsey* v. *State,* 232 Ga. 15, 205 S.E.2d 286 (1974) (prosecutor inveighed against a "rash" of crimes unattributed to the defendant); *Miller* v. *State,* 226 Ga. 730, 177 S.E.2d 253 (1970) (prosecutor called the defendant "a brute, beast, an animal, and a mad dog who did not deserve to live"); *Patterson* v. *State,* 124 Ga. 408, 52 S.E. 534 (1905) ("unless you have the manhood to write it in your verdict, you should be exiled from the good county of Heard").

[34] The statute under which pre-sentence proceedings are conducted in capital and noncapital cases does not prescribe differing rules for the two. Ga. Laws 1973, p. 162, No. 74. Nor did the latest version of the statute change the previous law regarding the scope of the matters that the jury might consider. See *Brown* v. *State,* Ga. Sup. Ct. No. 30362, decided December 2, 1975, slip op. at 5, quoted in text at page 37, *supra.*

> "[i]f the purpose of this Act is to strictly limit discretion in sentencing in capital cases, one wonders what must be the purpose of such a wide-open allowance of evidence and arguments in mitigation and aggravation . . . If the state desires to comport with [*Furman*] . . . which indicated that . . . discretion might be greatly restricted by limiting considerations to *specific, objective,* statutorily-prescribed guidelines, why, then, should the *hearing* of arguments and evidence in mitigation and aggravation remain unrestricted?"[35]

e. *Prosecutorial and judicial discretion to avert the death penalty at the stage of the pre-sentence hearing.*

In a subsequent section of this brief we shall discuss the broad discretion of the prosecutor to decline to press potentially capital charges through to capital convictions. See pages 54-58 *infra.* But even after a conviction of a "capital" charge, the prosecutor may, with the approval of the trial judge, forego a pre-sentence hearing and acquiesce in a sentence of less than death. *Jessen* v. *State,* 234 Ga. 791, 218 S.E.2d 52 (1975); *Gaines* v. *State,* 232 Ga. 727, 208 S.E.2d 798 (1974). The use of this procedure has not been limited to cases in which aggravating circumstances were obviously absent. In *Jones* v. *State,* 233 Ga. 662, 212 S.E.2d 832 (1975), for example, the prosecution elected not to seek the death penalty following the defendants' convictions of rape. These defendants had robbed their sixteen year-old victim, abducted her, and held her captive for a prolonged period, raping her repeatedly. *Compare Coker* v. *State,* 234 Ga. 555, 216 S.E.2d 782 (1975).

Similarly, a prosecutor has "discretion in deciding whether to ask the jury to impose the death penalty."

[35] Comment, *Constitutional Law—Capital Punishment*—Furman v. Georgia *and Georgia's Statutory Response,* 24 MERCER L. REV. 891, 932 (1973) (original emphasis).

Moore v. *State,* 233 Ga. 861, 213 S.E. 829, 834 (1975) (concurring opinion of Mr. Justice Hill). For example, in *Gaither* v. *State,* 234 Ga. 465, 216 S.E.2d 324 (1975), a robbery-murder case, *id.* at 325, the prosecutor told the jury:

> "we are not insisting on capital punishment. . . . I'm going to recommend—and I am doing this for more than one reason, because I think the defendants should have substantially the same sentence in this case. I'm going to recommend to you that you sentence Mr. Gaither to life imprisonment on the murder charge."

Gaither v. *State, supra* (Transcript of Proceedings 396). On the instruction of the court, the jury followed the prosecutor's recommendation. *Id.* at 400, 405.

3. Appellate Reconsideration of Death Sentences Merely Ratifies the Arbitrariness of the Georgia Capital Sentencing Process.

Although this Court, concurrently with ***Furman*** v. *Georgia,* and on its authority, reversed death sentences which had been reviewed by state appellate courts and affirmed on the express ground that the facts and circumstances warranted the extreme penalty,[36] the Georgia Supreme Court relied upon provisions for similar appellate review in differentiating current Georgia capital punishment laws from those struck down in ***Furman***:

> "[T]he new statute provides for automatic and swift appellate review to insure that the death penalty will not be carried out unless the evidence supports the finding of one of the serious crimes specified in the statute. The statute also requires comparative sentencing so that if the death penalty is only rarely imposed for an act or it is substantially out of line with sentences imposed for other acts it will be set aside as excessive. And, finally, the statute requires this court to make certain the record does not indicate that arbitrariness or discrimination was used in the imposition of the death sentence."

Coley v. *State,* 231 Ga. 829, 204 S.E.2d 612, 616 (1974).[37]

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[36] *See e.g. Alford* v. *Eyman,* 408 U.S. 939 (1972) (see *State* v. *Alford,* 98 Ariz. 124, 40 P.2d 551, 557 (1965); Ariz. Rev. Stat., §13-1717 (1956); *Hurst* v. *Illinois,* 408 U.S. 935 (1972) (see *People* v. *Hurst,* 42 Ill. 2d 217, 247 N.E. 2d 614 (1969)); *Alvarez* v. *Nebraska,* 408 U.S. 937 (1972) (see *State* v. *Alvarez,* 182 Neb. 358, 154 N.W. 2d 746, 748 (1967); Neb. Rev. Stat., §29-2308 (1943)); *Fesmire* v. *Oklahoma,* 408 U.S. 935 (1972) (see *Fesmire* v. *State,* 456 P.2d 573, 586-587 (Okla. Ct.Cr. App. 1969)); *Phelan* v. *Brierly,* 408 U.S. 939 (1972) (see *Commonwealth* v. *Phelan,* 427 Pa. 265, 234 A.2d 540 (1967); compare *Commonwealth* v. *Hough,* 358 Pa. 247, 56 A.2d 84, 85-86 (1948), with *Commonwealth* v. *Edwards,* 380 Pa. 52, 110 A.2d 216, 217 (1955)). The Court reversed death sentences from these states even though these same state appellate courts had a regular and recent practice of reversing death sentences when such sentences were found to be unwarranted upon a consideration of aggravating and mitigating circumstances. *See e.g. State* v. *Maloney,* 105 Ariz. 348, 464 P.2d 793 (1970); *People* v. *Crews,* 42 Ill. 2d 60, 244 N.E. 2d 593 (1969); *State* v. *Hall,* 176 Neb. 295, 125 N.W. 2d 918 (1964); *Lewis* v. *State,* 451 P.2d 399 (Okla. Ct. Crim. App. 1969); *Commonwealth* v. *Green,* 396 Pa. 137, 151 A.2d 241 (1959).

[37] The 1973 statute was not as innovative as this passage makes it sound. The Georgia courts have always had and exercised the power to reverse capital convictions and death sentences in cases which are rendered in trials tainted with passion and prejudice. See e.g. *Collier* v. *State,* 115 Ga. 803, 42 S.E. 226 (1902); *Myers* v. *State,* 97 Ga. 76, 25 S.E. 252 (1895); *Woolfolk* v. *State,* 81 Ga. 558, 8 S.E. 724 (1889); cf. *Walker* v. *State,* 132 Ga. App. 476, 208 S.E. 2d 350 (1974); *Robinson* v. *State,* 6 Ga. App. 696, 65 S.E. 792 (1909). And while the court has in the past declined to review the justifiability of legally authorized death sentences (see, e.g. *Smithwick* v. *State,* 199 Ga. 292, 34 S.E. 2d 28 (1945)), there is some Georgia precedent for the proposition that a criminal penalty can be invalidated as excessive, although not violative of any statutory limit. *Brooks* v. *Sturdivant,* 177 Ga. 514, 170 S.E. 369 (1933).

These appellate safeguards, the court concluded, combined with the sentencing criteria of the statute (*but see* pages 30-39 *supra*) to "meet the U.S. Supreme Court's concern with arbitrariness." *Ibid.* Yet upon closer examination of the review provisions themselves and of experience under them, it is evident that they have done nothing to curb the arbitrariness and discrimination inevitable under a death sentencing procedure as strewn with opportunities for whimsy and vindictiveness as Georgia's.

a. *Review limited to death cases.*

The limited applicability of the appellate review provision severely restricts its capability to control arbitrariness at the trial level. The Georgia Supreme Court may be able to vacate death sentences which it finds "excessive", but it cannot review the decisions of prosecutors, trial judges and juries not to sentence potentially capital offenders to death in cases indistinguishable from others in which death sentences have been imposed and are upheld.[38] The process through which a "capriciously selected

[38] See, e.g., the cases listed in note 61, *infra*. The Georgia Supreme Court has acknowledged its limitations in this respect, but asserts that its function is only to insure that those death sentences that are imposed are not freakishly unusual.

> "As we view the court's duty in light of the *Furman* and *Jackson* cases and the statutory provisions designed by the Georgia legislature to meet the objections of those cases, this court is not required to determine that less than a death sentence was never imposed in a case with some similar characteristics. On the contrary, we view it to be our duty under the similarity standard to assure that no death sentence is affirmed unless in similar cases throughout the state the death penalty has been imposed generally and not 'wantonly and freakishly imposed'."

Moore v. *State*, 233 Ga. 861, 213 S.E. 2d 829, 832 (1975).

random handful"[39] of defendants is chosen to be sent to their deaths obviously involves many decisions to avert the death penalty and only a few to impose it; and appellate review can only hope to affect the few.

> "No amount of appellate review can change the fact that the primary consideration of whether a man shall live or die still lies in the discretion of the jury, and that, while one jury might sentence a man to death, another might sentence the same man to life imprisonment, despite the presence of one or more of the aggravating circumstances. Thus, the fate of the defendant is dependent on the whim of his jury."[40]

b. *Review without principles of review.*

The standards for appellate review themselves inject a further element of capriciousness into sentencing under the 1973 legislation. The task of divining the motivations behind any given death sentence under an open-ended statute such as Georgia's seems well-nigh impossible. The breadth of the discretion given to sentencers by the law—to find or to ignore any of the vaguely-worded "aggravating circumstances" or the unenumerated and unfathomable "mitigating circumstances," and to refuse to sentence a defendant to death no matter what it finds—compound the inherent inability of an appellate court to detect the subtle but crucial atmospheric shadings of trials in which life is at stake, and make it altogether hopeless to suppose that the Georgia Supreme Court can discover the operation of "any . . . arbitrary factor" on sentencing determinations in any case. Ga. Code Ann. §27-2537(c)(1). Certainly the

[39] *Furman* v. *Georgia*, *supra*, 408 U.S. at 309-310 (concurring opinion of Mr. Justice Stewart).

[40] Brewster, *The Georgia Death Penalty State—Is It Constitutional, Even After Revision?*, 3 Ga. J. Corr. (No. 1) 14, 19 (1974).

determination whether a death sentence is "excessive . . . considering both the crime and the defendant," Ga. Code Ann. §27-2537(c)(3), constitutes a mere discretion to review discretion—little more than one additional opportunity to extend mercy to particular defendants who are thought deserving. Notably, but unsurprisingly, the Georgia Supreme Court has made no progress (indeed, it has made no effort) toward developing coherent or even articulate standards of appellate review. Instead it has, in most cases as in petitioner's (see note 42, *infra*), simply asserted that a particular death sentence did or did not pass muster under the statutory criteria, and then appended to its opinion the statutorily-required list of "similar" cases it considered in reaching its conclusion.[41] In no case has the court described the factual circumstances of cases cited in the statutorily-required list where (as is quite common) the appellate opinion does not disclose them; or explained why certain other cases were not considered; or undertaken to state how or why the facts of the case under review merited a harsher punishment than that imposed in other cases

[41] The significance of the cases cited in support of a particular decision to affirm a death sentence is often elusive. In petitioner's case for example, none of the cases listed provided any basis for the court's novel conclusion that the death penalty had been infrequently imposed for robbery. *Gregg* v. *State*, 233 Ga. 117, 210 S.E.2d 659, 667 (1974). In *Moore* v. *State*, 233 Ga. 861, 213 S.E. 2d 829 (1975), the court cited 23 cases, all apparently involving felony murders, in support of its conclusion that the death sentence in the case at bar (also a felony-murder) "was not 'wantonly and freakishly imposed.'" *Id.* at 833. Of the 23, only 1 (petitioner Gregg's) was decided under the 1973 statute, and 8 were decided when Georgia had no death penalty (and thus involved mandatory life sentences). The remaining 14 cases were tried before *Furman*, 7 resulting in life sentences and 7 in death sentences with no appreciable basis for the different outcomes. This grab-bag of cases could obvious'y be cited to support *any* result in *any* case with equal propriety. The list shows nothing other than exactly what *Furman* recognized: that Georgia felony-murder sentencing is random at best.

where equally aggravated crimes had received non-death sentences.[42]

Only three times has the Georgia Supreme Court gone beyond a ritual recital of the applicable statutory "standards" in reviewing a death sentence,[43] and its statements in those three cases have been little more enlightening than its silence in others. In *Moore* v. *State*, 233 Ga. 861, 213 S.E.2d 829 (1975), the court said it had determined from examining past cases that

[42] The usual litany is roughly that the court used in petitioner's case:

> "After considering both the crimes and the defendant and after comparing the evidence and the sentences in this case with those of previous murder cases, we are also of the opinion that these two sentences of death are not excessive or disproportionate to the penalties imposed in similar cases which are hereto attached."

Gregg v. *State*, 233 Ga. 117, 210 S.E.2d 659, 667 (1974). *See also*, e.g., *Mitchell* v. *State*, 234 Ga. 160, 214 S.E.2d 900, 902 (1975); *McCorquodale* v. *State*, 233 Ga. 369, 211 S.E.2d 577, 583 (1974); *Floyd* v. *State*, 233 Ga. 280, 210 S.E.2d 810, 814 (1974); *Hooks* v. *State*, 233 Ga. 149, 210 S.E.2d 668, 670 (1974), *Eberheart* v. *State*, 232 Ga. 247, 206 S.E. 2d 12, 18 (1974).

[43] In *Coley* v. *State*, *supra*, the one case in which the court vacated the death sentences of an appellant before it, two dissenting Justices found in similar past cases a pattern of maximum sentencing for rape defendants with prior convictions, which they argued dictated that Coley's death sentence should be affirmed. *Id.* at 618-619 (opinion of Mr. Justice Nichols). The majority undertook no such analysis, however, simply asserting that prior cases "indicate" that "similar factual situations and like aggravating circumstances" had resulted only in life sentences in the past, 204 S.E.2d at 617, a standard of review that one concurring Justice called "a nebulous measurement that I am unable to understand," *id.* at 620 (opinion of Mr. Justice Gunter, concurring and dissenting).

Whatever "standard" was developed in *Coley* was rendered even more "nebulous" by the Court's decision in *Coker* v. *State*, 234 Ga. 555, 216 S.E.2d 782 (1975). *Coker*, like *Coley*, involved a rape, robbery and abduction, little physical harm to the victim, and a defendant with a prior record. Yet Coker's death sentence was affirmed.

> "[n]otwithstanding the fact that there have been cases in which robbery victims were murdered and the juries imposed life sentences . . . juries faced with similar factual situations have imposed death sentences. . . . Thus, the death sentence here was not 'wantonly and freakishly imposed.'"

Id., 213 S.E.2d at 833.[44] In both *Jarrell* v. *State*, 234 Ga. 410, 216 S.E.2d 258 (1975), and *Tamplin* v. *State*, 235 Ga. 20, 218 S.E.2d 779 (1975), the court observed that in cases "where witnesses to [other crimes] . . . were killed, or an attempt was made to kill such witnesses, the death penalty has been imposed," *Tamplin* v. *State, supra*, 218 S.E.2d at 784. The court cited 16 cases in its Appendix to *Tamplin*, all of which resulted in death sentences, and most of which did involve robbery or burglary-murders. It did not, however, cite any of the numerous similar murder cases which, both under pre-*Furman* law and under the 1973 Act, had resulted in life sentences instead.[45]

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[44] The court in *Moore* also suggested an additional reason for its decision by citing *Pass* v. *State*, 227 Ga. 730, 182 S.E.2d 779 (1971), a case in which "the murder took place in the victim's home, as occurred in the case under consideration" and the jury imposed a death sentence. *Moore* v. *State, supra*, 213 S.E.2d at 833. But the two cases seem hardly comparable. In *Pass* the defendant killed *two* victims, apparently defenseless, and later bragged about it, see *Pass* v. *State, supra*, 182 S.E.2d at 784; in *Moore* the defendant shot a burglary victim who was shooting at him, and later showed considerable remorse and pled guilty. *Moore* v. *State, supra*, 213 S.E.2d at 832.

[45] See, *e.g.*, *Zirkle* v. *State*, —— Ga. ——, 219 S.E.2d 389 (1975); *Lerch* v. *State*, 234 Ga. 857, 218 S.E.2d 571 (1975); *Jackson* v. *State*, 234 Ga. 549, 216 S.E.2d 834 (1975); *Leach* v. *State*, 234 Ga. 467, 216 S.E.2d 326 (1975); *Hill* v. *State*, 232 Ga. 800, 209 S.E.2d 153 (1974); *Dutton* v. *State*, 228 Ga. 850, 188 S.E.2d 794 (1972); *Stevens* v. *State*, 228 Ga. 621, 187 S.E.2d 281 (1972); *Atkins* v. *State*, 228 Ga. 578, 187 S.E.2d 132 (1972); *Morris* v. *State*, 228 Ga. 39, 184 S.E.2d 82 (1971).

In both *Tamplin* and *Jarrell* the court recited that an additional factor involved in its decision was that "[t]he cold-blooded and callous nature" of the crime had been "condemned by death in other cases," *Jarrell* v. *State, supra*, 216 S.E.2d at 270; *Tamplin* v. *State, supra*, 218 S.E.2d at 784—a judgment highly subjective at best, and which also did little to distinguish these cases from others in which no death penalty had been imposed. See, *e.g.*, *Stapleton* v. *State*, —— Ga. ——, 220 S.E.2d 269 (1975); *Zirkle* v. *State*, —— Ga. ——, 219 S.E.2d 389 (1975); *Barker* v. *State*, 233 Ga. 781, 213 S.E.2d 624 (1975).

[46] In *Ross* v. *State*, 233 Ga. 356, 211 S.E.2d 361 (1974), the court noted that nothing prevented it from "examining non-appealed cases and cases in which the defendant pleaded guilty to a lesser offense" in the course of its "independent review." *Id.* at 359. But it did not explain how it proposed to become informed about such cases; and in *Moore* v. *State, supra*, where the appellant attempted to call to the court's attention two unappealed cases allegedly similar to his, the court said that these cases "cannot be considered by this Court. . . ." *Id.* at 832.

[47] See Brewster, *The Georgia Death Penalty Statute—Is It Constitutional, Even After Revision?*, 3 Ga. J. Corr. (No. 1) 14, 19 (1974), for inequities produced by this form of appellate review.

c. *Measurement with an arbitrary yardstick.*

The Georgia Supreme Court's exclusive reliance on cases that are appealed[46] as the standard by which to determine whether a "sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant," Ga. Code Ann. §27-2537 (c)(3), manifestly provides no reliable guide to whether the death penalty is being uniformly imposed under similar factual circumstances. A comparative sample consisting only of cases appealed to the Georgia Supreme Court is woefully distorted in two ways. First, cases are ignored which involve similar factual circumstances but were disposed of by the various pre-conviction selective mechanisms described at pages 53-65 *infra*. Second, no account is taken of capital convictions for which a life sentence is imposed and which are not appealed. Both excluded groups of cases, of course, represent by definition prosecutions where death sentences were *not* imposed; so death-sentenced appellants before the Georgia Supreme Court must necessarily play the deadly game against a stacked deck.[47] The court altogether lacks the capacity to determine, from a skewed and meager sample of this sort, what penalties are reg-

ularly and normally imposed in "similar cases," Ga. Code Ann. §27-2537(c)(3).

But this is not the whole problem. For the Georgia Supreme Court, as explicitly authorized by statute,[48] has persisted in comparing the death sentences before it with death sentences meted out under Georgia's pre-*Furman* procedures[49]—that is, death sentences which were "wantonly and . . . freakishly imposed," *Furman* v. *Georgia*, *supra*, 408 U.S. at 310 (concurring opinion of Mr. Justice Stewart), at a time when "there [was] . . . no meaningful basis for distinguishing the few cases in which [the death penalty was] . . . imposed from the many cases in which it [was] . . . not," *id.* at 313 (concurring opinion of Mr. Justice White), and when "the discretion of judges and juries in imposing the death penalty enable[d] the penalty to be selectively applied, feeding prejudices against the accused if he [was] . . . poor and despised, lacking political clout, or if he [was] . . . a member of a suspect or unpopular minority," *id.* at 255 (concurring opinion of Mr. Justice Douglas). A clearer case of an appeal from Paul Drunk to Paul Sober can hardly be imagined.[50] And of course, the system is self-perpetuating: as time passes, each new death sentence is approved by comparison with previous ones which were in turn approved as comparable to others *Furman* held cruel and unusual.[51]

[48] *See* Ga. Code Ann. §27-2537(f).

[49] This is true even in the court's most recent decisions. *See*, e.g., *Mason* v. *State*, Ga. Sup. Ct. No. 30338, decided January 7, 1976, in which 12 of the 16 cases considered were pre-*Furman*, some of them (e.g. *Henderson* v. *State*, 227 Ga. 68, 179 S.E.2d 76 (1970), *vacated* 408 U.S. 938 (1972)) explicitly held unconstitutional by this Court.

[50] *Cf. Lane* v. *Wilson*, 307 U.S. 268 (1938).

[51] For example, in petitioner Gregg's case, all but one of the death-sentence cases cited by the Georgia Supreme Court were pre-*Furman* cases. *See Gregg* v. *State*, *supra*, 210 S.E.2d at 667. The exception is *House* v. *State*, 232 Ga. 140, 205 S.E.2d 217 (1974), which in turn was affirmed with exclusive reference to pre-*Furman* cases. See *House* v. *State*, *supra*, 205 S.E.2d at 222.

These appellate review procedures have thus far resulted in the removal, "pursuant to a nebulous measurement," [52] of one inmate from the Georgia death row population.[53] In every other instance of sentencing review, the Georgia Supreme Court has affirmed the sentencer's decision to condemn the defendant.[54] Its role in the capital sentencing process clearly has not regularized and clearly cannot regularize the infliction of the punishment of death in Georgia.

4. The Results of the Georgia Sentencing Process: Caprice and Arbitrariness.

In sum,

> "[W]hat Georgia has done is to lay down a smoke-screen of plenteous words, which, on hasty reading,

[52] *Coley* v. *State*, 231 Ga. 829, 204 S.E.2d 612, 620 (1974) (opinion of Mr. Justice Gunter, concurring in part and dissenting in part). But see note 43, *supra*.

[53] *Coley* v. *State*, *supra* note.

[54] *Eberheart* v. *State*, 232 Ga. 247, 206 S.E.2d 12 (1974); *House* v. *State*, 232 Ga. 140, 205 S.E.2d 217 (1974); *Gregg* v. *State*, 233 Ga. 117, 210 S.E.2d 659 (1974); *Hooks* v. *State*, 233 Ga. 149, 210 S.E.2d 668 (1974); *Floyd* v. *State*, 233 Ga. 280, 210 S.E.2d 810 (1974); *Ross* v. *State*, 233 Ga. 361, 211 S.E.2d 356 (1974); *McCorquodale* v. *State*, 233 Ga. 369, 211 S.E.2d 577 (1974); *Moore* v. *State*, 233 Ga. 861, 213 S.E.2d 829 (1975); *Mitchell* v. *State*, 234 Ga. 160, 214 S.E.2d 900 (1975); *Chenault* v. *State*, 234 Ga. 210, 215 S.E.2d 223 (1975); *Jarrell* v. *State*, 234 Ga. 410, 216 S.E.2d 258 (1975); *Coker* v. *State*, 234 Ga. 555, 216 S.E.2d 782 (1975); *Tamplin* v. *State*, 235 Ga. 20, 218 S.E.2d 779 (1975); *Mason* v. *State*, Ga. Sup. Ct. (No. 30338, decided December 2, 1975). The court *has* continued, in the wake of petitioner Gregg's case, to reverse death sentences for robbery on the ground that they are infrequently imposed; but in no case has it done so where the death sentence was the only one pronounced on a particular defendant. *See Jarrell* v. *State*, 234 Ga. 410, 216 S.E.2d 258 (1975); *Floyd* v. *State*, 233 Ga. 280, 210 S.E.2d 810 (1974). The court has also reversed three death sentences for *procedural* error in the penalty phase. *Prevatte* v. *State*, 233 Ga. 929, 214 S.E.2d 365 (1975); *Jordan* v. *State*, 233 Ga. 929, 214 S.E.2d 365 (1975); *Brown* v. *State*, —— Ga. ——, 220 S.E.2d 922 (1975).

> mask the fact that exactly the same old unbridled jury discretion is there, if only the jury, guided by court and prosecutor, can grope its way through the verbal haze." [55]

For

> "the primary consideration of whether a man shall live or die is still left to the bald discretion of the jury. It is only after the decision that the verdict shall be death has been made, that the jury goes about the process of rationalizing away the caprice or arbitrariness of their actions." [56]

And "[n]o amount of appellate review" will serve, after the fact, to regularize the process.[57]

The inevitable result is that sentencing in Georgia remains now, as it was at the time of *Furman*, irrational and arbitrary in the extreme. That it could be little else is evident, for history in this country has now shown that where a statutory system permits the death penalty to be "wantonly and . . . freakishly imposed" [58] it will be.[59] We have previously noted some of the reasons why appellate reports cannot tell the full story—or any appreciable part of the story—of this lottery of life and death.[60] But enough of the story appears in the Georgia appellate reports to establish the fact of capriciousness, if not its dimensions. The capital sentencing pattern that emerges is no pattern at all, the same kind of crazy-quilt of arbitrary and in-

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[55] BLACK, *op. cit. supra* note 26, at 65.

[56] Brewster, *The Georgia Death Penalty Statute—Is It Constitutional, Even After Revision?*, 3 GA. J. CORR. (No. 1) 14, 18 (1974).

[57] *Id.* at 19.

[58] *Furman* v. *Georgia*, *supra*, 408 U.S. at 310 (concurring opinion of Mr. Justice Stewart).

[59] *See* Part III of the Brief for Petitioner, *Jurek* v. *Texas*, No. 75-5394.

[60] See pages 42-43, *supra*.

consistent decision-making[61] that was present at the time of *Furman*.[62]

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[61] *Compare, e.g., Barrow* v. *State*, Ga. Sup. Ct. No. 30322, decided December 2, 1975 (defendant coldly shot victim to death in course of a grocery store robbery—death sentence), and *Tamplin* v. *State*, 235 Ga. 20, 218 S.E.2d 779 (1975) (defendant shot victim to death in course of grocery store robbery—death sentence), *with Thomas* v. *State*, 233 Ga. 237, 210 S.E.2d 675 (1974) (defendant stabbed victim [16 times] to death in course of grocery store robbery—life sentence), *and Zirkle* v. *State*, —— Ga. ——, 219 S.E.2d 389 (1975) (defendant coldly shot victim to death in gas station robbery—life sentence). *Compare Prevatte* v. *State*, 233 Ga. 929, 214 S.E.2d 365 (1975) (street robbery in which two defendants shot and killed victim—death sentences), *with Gaither* v. *State*, 234 Ga. 465, 216 S.E.2d 324 (1975) (street robbery in which one of two defendants shot and killed victim—life sentences), *and Sims* v. *State*, 234 Ga. 177, 214 S.E.2d 902 (1975) (street robbery in which defendant shot and killed witness while fleeing—life sentence), *and Leach* v. *State*, 234 Ga. 467, 216 S.E.2d 326 (1975) (robbery of taxi driver in which defendant shot and killed victim in order to prevent victim from fleeing—life sentence [see Transcript of Record 709-712]). *Compare Chenault* v. *State*, 234 Ga. 216, 215 S.E.2d 223 (1975) (defendant shot three victims without provocation, two died—death sentence) *with Stapleton* v. *State*, —— Ga. ——, 220 S.E.2d 269 (1975) (defendant shot three victims without provocation, two died—life sentence). *Compare Gregg* v. *State*, 233 Ga. 117, 210 S.E.2d 659 (1974) (defendant murdered two victims and stole their car —death sentence), *with Brannen* v. *State*, —— Ga. ——, 220 S.E.2d 264 (1975) (defendant murdered two victims and stole their car —life sentence), and *Lerch* v. *State*, 234 Ga. 857, 218 S.E.2d 571 (1975) (defendant and another brutally murdered victim of secluded robbery—life sentence [see Transcript of Record 10-30]). *Compare Hooks* v. *State*, 233 Ga. 149, 210 S.E.2d 668 (1974) *and Eberheart* v. *State*, 232 Ga. 247, 206 S.E.2d 12 (1974) (co-perpetrators of kidnap-rape in which victim was badly beaten—death sentences), *with Wood* v. *State*, 234 Ga. 758, 218 S.E.2d 47 (1975) (rape in which victim was badly beaten—life sentence). *Compare Coker* v. *State*, 234 Ga. 555, 216 S.E.2d 782 (1975) (rape/robbery/kidnapping, victim not beaten—death sentence), *and Coley* v. *State*, 231 Ga. 829, 204 S.E.2d 612 (1974) (rape/robbery/kidnapping, victim beaten but not seriously—death sentence), *with Jones* v. *State*, 233 Ga. 662, 212 S.E.2d 832 (1975) (rape involving robbery and abduction, victim not beaten—life sentence), and *Allen* v. *State*, 233 Ga. 200, 210 S.E.2d 680 (1974) (rape/kidnapping, victim not beaten—life sentence).

[62] At the time of *Furman* v. *Georgia*, several states had limitations on the jury's discretion to make the life-death choice and

Thus, despite the mandate of *Furman* v. *Georgia,* petitioner remains simply one of "a capriciously selected random handful upon whom the sentence of death has in fact been imposed," [63] with "no meaningful basis for distinguishing" the spared from the condemned.[64] This case does not therefore necessitate resolution of the question whether, in the words of Chief Justice Burger's *Furman* dissent, "[t]here is [any] . . . reason to believe that sentencing standards in any form will substantially alter the discretionary character of the [pre-*Furman*] . . . system of sentencing in capital cases.[65] *See also McGautha* v. *California,* 402 U.S. 183, 208 (1971); ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, REPORT 174 (H.M.S.O. 1953) [Cmd. 8932]. For it is clear that

> "... the Georgia statutes involved in this case authorize nothing more and nothing less than the discretionary imposition of the death penalty by the fact-finder."

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standards for the appropriate exercise of that discretion which were little, if any, less clear and confining than those in the present Georgia statutes. Death sentences from these states were nevertheless uniformly held unconstitutional. *Davis* v. *Connecticut,* 408 U.S. 935 (1972) (see Conn. Gen. Stat. Ann., §53-10 (1967)); *Moore* v. *Illinois,* 408 U.S. 786 (1972) (see *People* v. *Black,* 367 Ill. 209, 10 N.E.2d 801, 804 (1937); *People* v. *Sullivan,* 245 Ill. 87, 177 N.E. 733 (1933); Ill. Rev. Stat., c. 38, §1-7-(c) (1)); *Alvarez* v. *Nebraska,* 408 U.S. 937 (1972) (see *Sundahl* v. *State,* 154 Neb. 550, 48 N.W.2d 689, 704 (1951)); *Billingsley* v. *New Jersey,* 408 U.S. 934 (1972) (See N.J. Stat. Ann., §2A:113-4 (1969); *State* v. *Reynolds,* 41 N.J. 163, 195 A.2d 449 (1963)); *Duling* v. *Ohio,* 408 U.S. 936 (1972) (See *State* v. *Tudor,* 154 Ohio St. 249, 95 N.E.2d 285, 390 (1950); *State* v. *Eaton,* 19 Ohio St. 145, 249 N.E.2d 897 (1969)); *Herron* v. *Tennessee,* 408 U.S. 937 (1972) (see Tenn. Code Ann., §39-2406 (1955); *Woodruff* v. *State,* 164 Tenn. 530, 51 S.W.2d 843, 847 (1932)).

[63] *Furman* v. *Georgia, supra,* 408 U.S. at 309-310 (concurring opinion of Mr. Justice Stewart).

[64] *Id.* at 313 (concurring opinion of Mr. Justice White).

[65] *Id.* at 401.

Coley v. *State, supra,* 204 S.E.2d at 620 (opinion of Mr. Justice Gunter, concurring and dissenting).

B. *Before and After the Pre-Sentence Hearing*

The 1973 Georgia capital punishment statute was set atop a system already riddled with opportunities for arbitrariness in the selection of those who are to live and those who are to die for "capital" crime in Georgia. Both William Henry Furman and petitioner Troy Leon Gregg were "capriciously selected" [66] to die not only by their respective sentencing juries, but by a process which, from start to deadly finish, is "pervaded by discretion." [67] The "large number of actors" [68] who decide whether or not a given defendant is "fit to live" [69] play their parts in Georgia, as elsewhere,[70] from the inception of a "capital" prosecution to the eve of execution.

Both discretion and arbitrariness are inherent in unregulated prosecutorial charging and plea bargaining authority—in raw exercises of sentencing choice under guise of degree-of-guilt determinations made by trial juries applying opaque and amorphous grading schemes to the gradeless question of life or death—and in the executive's "prerogative of mercy" that kills where it does *not* alight. All of these have been discussed at length in the Brief for

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[66] *Furman* v. *Georgia, supra,* 408 U.S. at 309-310 (concurring opinion of Mr. Justice Stewart).

[67] *Coley* v. *State, supra,* 204 S.E.2d at 620 (opinion of Mr. Justice Gunter, concurring and dissenting).

[68] Brief for the United States as *Amicus Curiae* in *Fowler* v. *North Carolina,* No. 73-7031, at 76.

[69] *Witherspoon* v. *Illinois,* 391 U.S. 510, 521 n.20 (1968).

[70] *See* Parts III, respectively, of the Briefs for Petitioners in *Roberts* v. *Louisiana,* No. 75-5844, and *Jurek* v. *Texas,* No. 75-5394, and of the Brief of the NAACP Legal Defense and Educational Fund, Inc., as *Amicus Curiae* in *Proffitt* v. *Florida,* No. 75-5706.

Petitioner, *Fowler* v. *North Carolina*, at pp. 41-101 [hereafter cited as Petitioner's *Fowler* Brief]. We will not burden the Court here with a repetition of that discussion, but will only outline the particular features of Georgia criminal law and procedure that implement the process of capricious selectivity which is described in its more general features in the *Fowler* brief.

1. Prosecutorial Charging Discretion.

The role of a Georgia district attorney is broadly discretionary.

> "The whole proceeding, from the time the case is laid down before him, where an indictment is demanded, until the rendition of the verdict, is under his direction, supervision and control . . ."

Hicks v. *Brantley*, 102 Ga. 264, 29 S.E. 459, 462 (1897).

The district attorney's discretionary authority begins with the decision whether to prosecute and what charges to bring. Although the Georgia common-law tradition requires indictment by a grand jury in capital cases,[71] the district attorney's duty to "attend on the grand juries, advise them in relation to matters of law, and swear and examine witnesses before them," Ga. Code Ann. §24-2908(2) (1971), places the charging decision effectively in his hands.

> "The [district attorney] . . . is the official counselor of the grand jury. They look to him for advice and counsel in finding true bills, and their actions thereon are nearly always guided by him."

Nichols v. *State*, 17 Ga. App. 593, 87 S.E. 817, 822 (1916). It is the prosecutor who "determine[s] whether or not to

[71] *Smith* v. *Strozier*, 226 Ga. 283, 174 S.E.2d 417 (1970) (dictum); *Webb* v. *Henlery*, 209 Ga. 447, 74 S.E.2d 7 (1953).

commence a particular prosecution," *Hicks* v. *Brantley*, *supra*, 29 S.E. at 462, and who "draws the bill of indictment"—and thus determines what charges it will contain—if one is commenced. *Ibid.*; *Scott* v. *State*, 53 Ga. App. 61, 185 S.E. 131, 135 (1936).

The district attorney has the discretion not only to initiate a prosecution, but also "to discontinue one already begun." *Hicks* v. *Brantley*, *supra*, 29 S.E. at 462. He must obtain the consent of the court to enter a formal *nolle prosequi*[72] (though standards governing that consent are nowhere specified)[73]—but a prosecution apparently may be informally abandoned "even without the concurrence of a judicial office." *Smith* v. *Embry*, 103 Ga. App. 375, 119 S.E.2d 45, 49 (1961) (dictum); *cf. Waters* v. *Walkover Shoe Shop*, 142 Ga. 137, 82 S.E. 537 (1914).

2. Plea Bargaining.

Most importantly, perhaps, a district attorney has "discretion in bargaining for a plea of guilty in exchange for a non-death sentence." *Moore* v. *State*, 233 Ga. 861, 213 S.E.2d 829, 834 (1975) (concurring opinion of Mr. Justice Hill).[74] Though Georgia trial courts have power—itself

[72] Ga. Code Ann. §27-1801 (1973); *Edwards* v. *State*, 121 Ga. 590, 49 S.E. 674 (1905). A *nolle prosequi* is not a bar to further prosecution unless it is entered after the case has been submitted to the jury. *McGahee* v. *State*, 133 Ga. App. 964, 213 S.E.2d 91 (1975). A prosecutor may achieve the same result as a *nolle prosequi* by moving the court to place a case on the "dead docket." *See Underhill* v. *State*, 129 Ga. App. 65, 198 S.E.2d 703 (1973).

[73] It seems unlikely that in most cases the consent of the court is anything more than a formality. "Ordinarily a motion to nolle pros. made by [a district attorney] is granted . . . ." *Griffin* v. *State*, 12 Ga. App. 615, 77 S.E. 1080, 1085 (1913).

[74] Ga. Code Ann. §27-2528 (1975 Supp.) provides:

> "[a]ny person who has been indicted for an offense punishable by death may enter a plea of guilty at any time after his indictment, and the judge of the superior court having juris-

discretionary—to reject guilty pleas[75] and are not bound by prosecutorial stipulations as to sentence,[76] a district attorney's "advice [is] generally accepted that a plea of guilty be received with a recommendation for [lesser] punishment." *Griffin* v. *State, supra,* at 1085.

> "Well-nigh any attorney representing one accused of crime would unhesitatingly accept an assurance from the [district attorney] . . . that if a plea of guilty with a recommendation would be entered the recommendation would be respected by the court."

Ibid. Further, if a prosecutor's recommendation of punishment is *not* accepted by the court, a guilty plea made in reliance on a representation that the court would take it may be withdrawn. *Ballard* v. *State,* 131 Ga. App. 847, 207 S.E.2d 246 (1974); *Holston* v. *State,* 103 Ga. App. 373,

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diction may, in his discretion, during term time or vacation, sentence such person to life imprisonment, or to any punishment authorized by law for the offense named in the indictment."

No pre-sentence hearing before a jury is required in guilty plea cases. *Ballard* v. *State,* 131 Ga. App. 847, 207 S.E.2d 246 (1974). Instead, the presiding judge fixes the sentence, and may impose the death penalty or any other authorized penalty "in the exercise of his discretion." *Massey* v. *State,* 220 Ga. 883, 142 S.E.2d 832, 837 (1965); *Moore* v. *State,* 233 Ga. 861, 213 S.E.2d 829, 834 (1975) (concurring opinion of Mr. Justice Hill). Before pronouncing sentence the judge may hold a hearing, *Hooks* v. *State,* 233 Ga. 149, 210 S.E.2d 668 (1974); and before pronouncing a death sentence he "must find one of the statutory aggravating circumstances provided in section 27-2534.1 . . . except in cases of treason or aircraft hijacking." Ga. Code Ann. §27-2528 (1975 Supp.) But the court need not impose, or even consider, a death penalty in any case.

[75] A guilty plea may or may not be accepted by the judge, "in his discretion." *McCorquodale* v. *State,* 233 Ga. 369, 211 S.E.2d 577, 582 (1974); *Pass* v. *State,* 227 Ga. 730, 182 S.E.2d 779 (1971).

[76] *Shearer* v. *State,* 128 Ga. App. 809, 198 S.E.2d 369, 370 (1973); *Griffin* v. *State, supra,* 77 S.E. at 1085.

119 S.E.2d 302, 304 (1961) (dictum); *Rowland* v. *State,* 72 Ga. App. 793, 35 S.E.2d 372 (1945); *Griffin* v. *State, supra.*

Thus in fact, if not technically in law, Georgia prosecutors have the power to assure that the court will impose a non-death sentence on a guilty plea, and they have a discretion to give or to withhold that assurance which is totally unfettered by the 1973 capital punishment statute or by any other significant restriction.[77] It is the plea bargaining process that accounts for an estimated ninety percent of all criminal dispositions,[78] and the prosecutor's decision to engage in it is "probably the most widely significant choice separating the doomed from those who . . . go to prison."[79] Yet Georgia law and practice leave that decision to individual district attorneys, and provide no oversight, guidance, or control to insure against inconsistency and arbitrariness in the plea bargaining policies of district attorneys generally or of any particular district attorney.

Further, as we have noted at pages 42-43 *supra,* Georgia's appellate-review procedures create a multiplier effect through which plea bargaining enhances the capriciousness of the overall system in a compound fashion. Since life sentences received pursuant to plea bargains will seldom be appealed, this large group of capital-case dispositions forms no part of the universe considered by the Georgia

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[77] See *Thomason* v. *Caldwell,* 229 Ga. 637, 194 S.E.2d 112 (1972). The "consent verdict" procedure sometimes used in Georgia—whereby the defense and prosecution stipulate to a jury, waive all argument and evidentiary presentation, and ask a juror to sign, as foreman, a prepared verdict finding the defendant guilty but recommending mercy—provides an alternative to a guilty plea that may be even freer from judicial supervision and control. See *Caldwell* v. *Paige,* 230 Ga. 456, 197 S.E.2d 692 (1973).

[78] President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: The Courts 9 (G.P.O. 1967).

[79] Black, *op. cit. supra* note 26 at 43. See also Petitioner's *Fowler* Brief, at 53-61.

Supreme Court in its statutory sentence review. The invisibility of prosecutorial exercises of mercy thereby prevents meaningful patterns of capital sentencing from being formed or enforced at any level of the process.

3. Jury Discretion.

The sentencing discretion expressly conferred upon trial juries by the 1973 Georgia capital punishment statutes, see pages 31-34 *supra,* is not the first or only means available to the jury to spare the defendant's life in cases where, if otherwise disposed, it might consign him to die. At the first stage of Georgia's bifurcated trial, the jury may also avert any possibility of a death sentence by convicting the defendant of a lesser offense[80] or by finding his conduct nonculpable, through the application of legal doctrines that supply an indeterminate "dispensing power [couched] . . . in a mystifying cloud of words." [81]

A Georgia trial judge must charge lesser included offenses when they are established under "any view" of the evidence, *Sims* v. *State,* 203 Ga. 668, 47 S.E.2d 862 (1948), that is, "where, from the evidence or from the defendant's statement at the trial, there is *anything deducible* which would *tend* to show that he was guilty of [the lesser offense] . . . or which would be sufficient to raise a *doubt* as to which

[80] Ga. Code Ann. §26-505 (1972) provides:

"An accused may be convicted of a crime included in a crime charged in the indictment, information, or accusation. A crime is so included when:

"(a) It is established by proof of the same or less than all the facts or a less culpable mental state than is required to establish the commission of the crime charged, or

"(b) It differs from the crime charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpability suffices to establish its commission."

[81] Cardozo, Law and Literature 101 (1931).

of these grades [of the offense] . . . was committed." *Echols* v. *State,* 46 Ga. 668, 168 S.E. 790, (1933) (emphasis in original), citing *Reeves* v. *State,* 22 Ga. App. 628, 97 S.E. 115 (1918). So, "[i]f there be any evidence, however slight, as to whether the offense is murder or manslaughter, instructions as to both should be given to the jury." *Linder* v. *State,* 132 Ga. App. 624, 208 S.E.2d 630, 631 (1974).[82] Trial judges are admonished to submit lessers, whether or not the defendant requests their submission, *Banks* v. *State,* 227 Ga. 578, 182 S.E.2d 106 (1971), or even objects to it, *Hobbs* v. *State,* 134 Ga. App. 850, 216 S.E.2d 674 (1975); and even where the lessers are inconsistent with the defendant's version of the facts, *Henderson* v. *State,* 234 Ga. 827, 218 S.E.2d 612 (1975). Lessers need not be submitted if there is no evidence to support them, *Henderson* v. *State,* 227 Ga. 68, 179 S.E.2d 76 (1970): it was upon this theory that the Georgia Supreme Court sustained the trial judge's refusal to submit manslaughter instructions to the jury at petitioner Gregg's trial, *Gregg* v. *State,* 233 Ga. 117, 210 S.E.2d 659, 663 (1974).

These rules operate in the context of a body of substantive law that makes their general application highly speculative. Georgia does not recognize degrees of murder, but defines this potentially capital crime in terms of striking breadth and imprecision:

> "(a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate itention unlawfully to

[82] Both voluntary and involuntary manslaughter are lesser included offenses of the crime of murder. *Waller* v. *State,* 107 Ga. App. 609, 131 S.E.2d 111 (1963); *Perry* v. *State,* 78 Ga. App. 273, 50 S.E.2d 709, 714 (1948); *Lee* v. *State,* 74 Ga. App. 212, 39 S.E.2d 426 (1946).

take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.

"(b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice."

Ga. Code Ann. §26-1101 (1972). Notwithstanding the manifest inscrutability of the "malice" concept, see *Leonard* v. *State*, 113 Ga. 435, 60 S.E. 251 (1900), the practice of defining it to the jury merely by reading its statutory definition has been approved. *Bowen* v. *State*, 225 Ga. 422, 169 S.E.2d 322 (1969).

In many cases, the line between murder and manslaughter depends upon the presence or absence of "a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person"; but a provoked killing is nonetheless murder if the jury finds there was "an interval between the provocation and the killing sufficient for the voice of reason and humanity to be heard."[83] The administration of these opaque elements lies, in the first instance, with the trial judge who

[83] Ga. Code Ann. §26-1102 (1972) provides:

"A person commits voluntary manslaughter when he causes the death of another human being, under circumstances which would otherwise be murder, if he acts solely as the result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person; however, if there should have been an interval between the provocation and the killing sufficient for the voice of reason and humanity to be heard, of which the jury in all cases shall be the judge, the killing shall be attributed to deliberate revenge and be punished as murder. A person convicted of voluntary manslaughter shall be punished by imprisonment for not less than one nor more than 20 years.

must decide whether the facts of the case present them; but if there is any evidence to support a provocation-and-passion charge, the ultimate determination is within the exclusive province of the jury. *Linder* v. *State*, 132 Ga. App. 624, 208 S.E.2d 630 (1974).[84]

Moreover, the 1968 Georgia Criminal Code altered the prior Georgia law relating to attempts and assaults,[85] so that "[a] person may be convicted of criminal attempt if the crime attempted was actually committed in pursuance of the attempt," Ga. Code Ann. §26-1004 (1972), and "[a] person may be convicted on [sic] an assault with intent to commit a crime if the crime intended was actually committed as a result of the assault," Ga. Code Ann. §26-1303 (1972).[85] Under the new provisions, apparently trial judges

[84] *Linder* illustrates the extent of the jury's discretion to find provocation wherever it wishes. There "the amount of provocation . . . was not shown, nor the length of cooling time between then and the time of the killing." 208 S.E.2d at 631. Nonetheless, the Court of Appeals held that "these were all for the jury's determination, and the jury's province was to decide as to whether the offense be murder or manslaughter." *Ibid.* *See also, e.g., Robinson* v. *State*, 109 Ga. 506, 34 S.E. 1017 (1900), where, though the Supreme Court believed "the truth of the case" was of "a cold-blooded and wanton murder" of a Black man by a White, *id.* at 1018,

"[t]here was some little evidence, and a portion of the statement, sufficiently bringing into the case the theory of mutual combat to authorize a charge on voluntary manslaughter, and a conviction of this offense at the hands of a jury who wished to lean strongly to the side of mercy. We therefore approve the charge on voluntary manslaughter, and, on the merits of the case, decline to disturb the jury's finding. There was too much of righteousness in it for us to set it at naught."

Ibid.

[85] Ga. Code Ann. §27-2508, which was apparently not repealed by the 1968 Criminal Code, prohibits exactly what §§ 26-1004 and 26-1303 allow, but the Georgia Supreme Court has noted that the new statutes changed the old rule. *Ward* v. *State*, 231 Ga. 484, 202 S.E.2d 421 (1973); *Jones* v. *Smith*, 228 Ga. 648, 187 S.E.2d 298 (1972).

are not required to charge on attempt and assault where a greater offense was consummated,[86] but are permitted to do so.[87]

Doctrines of justification submitted for the jury's consideration in Georgia murder cases also leave ample room for "response to sentiment under the guise of resolving issues of evidential doubt." [88] Some such justifications are defined in impressionistic and moralistic terms by statute—like the justification of self-defense that was submitted to the jury at petitioner Gregg's trial[89]—but Ga. Code Ann.

[86] *Payne* v. *State*, 231 Ga. 755, 204 S.E.2d 128 (1974); *Ward* v. *State*, 231 Ga. 484, 202 S.E.2d 421 (1973).

[87] *Cf. Holcomb* v. *State*, 230 Ga. 525, 198 S.E.2d 179 (1973). *Holcomb* held squarely that instructions on robbery by intimidation were permitted but not required where all the evidence showed robbery by armed force, in view of Ga. Code Ann. §26-1902 (1972), which authorized conviction of that lesser offense. *Holcomb* was cited as primary authority in both *Payne* and *Ward*, note 86 *supra*. Consistently with *Holcomb*, the trial court in petitioner Gregg's case instructed on robbery by intimidation (T. 432) even though the only evidence of robbery showed that it was committed by shooting Mr. Moore and Mr. Simmons to death.

[88] KALVEN & ZEISEL, THE AMERICAN JURY 427 (1966).

[89] T. 430-421. Ga. Code Ann. §26-901(a) (1972) makes homicide justifiable when the person committing it is justified in his use of force. Ga. Code Ann. §26-902 provides:

> "(a) A person is justified in threatening or using force against another when and to the extent that he reasonably believes that such threat or force is necessary to defend himself or a third person against such other's imminent use of unlawful force; however, a person is justified in using force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent death or great bodily injury to himself or a third person, or the commission of a forcible felony.
>
> "(b) A person is not justified in using force under the circumstances specified in paragraph (a) of this section if he: (1) initially provokes the use of force against himself with the intent to use such force as an excuse to inflict bodily harm upon the assailant; or (2) is attempting to commit, committing, or fleeing after the commission or attempted commission of a felony; or (3) was the aggressor or was engaged in a combat by agreement, unless he withdraws from the encounter and effectively communicates to such other person his intent to do so and the other notwithstanding continues or threatens to continue the use of unlawful force."

§26-901(f) (1972) also provides that homicide may be held justified "[i]n all instances which stand upon the same

Thus, a jury evaluating a self-defense claim must first decide whether the defendant reasonably believed that he was in danger of death or great bodily injury (that is, "serious personal injury," *Williams* v. *State*, 126 Ga. 454, 191 S.E.2d 100, 102 (1972)). The Georgia Supreme Court has held that "the reasonable fears of the defendant" are not equivalent to "the fears of a reasonable man," and that it is the latter which establish the standard of conduct for justifiable homicide, *Moore* v. *State*, 228 Ga. 662, 187 S.E.2d 277, 279 (1972); but the court has not explained the distinction between the erroneous and correct standards. In any event, "'[i]n all . . . cases the motive with which the slayer acted is for determination by the jury; and if it be claimed that the homicide was committed, not in a spirit of revenge, but under the fears of a reasonable man, it is for the jury to decide whether or not the circumstances were sufficient to justify the existence of such fear.'" *York* v. *State*, 226 Ga. 281, 174 S.E.2d 418, 419 (1970), *quoting Jarrard* v. *State*, 206 Ga. 112, 55 S.E.2d 706, 709-710 (1949). "The standard of a reasonable man, by which the conduct of a particular person under given circumstances is to be judged, is one which the jury must determine from their own observation and their common knowledge and experience." *Fudge* v. *State*, 190 Ga. 340, 9 S.E.2d 259, 262 (1940).

Further subtle distinctions abound. The jury must, for example, distinguish between "provocation by threats," which will neither justify nor reduce murder, and "threats accompanied by menaces," which may justify it altogether. *York* v. *State*, *supra*, 174 S.E.2d at 419, *Jarrard* v. *State*, *supra*, 55 S.E.2d at 709. It must determine whether the defendant provoked an incident with "the intent to use [the other's response] . . . as an excuse to inflict bodily injury" on him or merely "creates a necessity for the deceased to defend himself," *Lundy* v. *State*, 119 Ga. App. 585, 168 S.E.2d 199, 201 (1969). In the latter case, the defendant's use of force is justified if, but only if, he "withdraws . . . and effectively communicates" his intent to do so. Ga. Code Ann. §26-902(b) (1972); *see Lundy* v. *State*, *supra*. The jury must also determine whether the two parties engaged in battle with a "willingness, a readiness and an intention" to fight, *Williams* v. *State*, 232 Ga. 203, 206 S.E.2d 37, 38 (1974), in which case the killing may not

footing of reason and justice as those enumerated in this Chapter." [90] And Georgia law relating to insanity as a criminal defense exhibits characteristic murkiness.[91]

Palpably, these various doctrines—theoretically requiring factual determinations but realistically making those determinations both mysterious and "demeaningly trivial compared to the stakes" [92]—invest trial juries with a broad range of optional outlets through which particular capital offenders may be permitted to escape even the risk of a death sentence if, in the jurors' eyes, they do not *deserve* to die. In some but not all cases, the scope of the jury's discretion in this regard depends upon an antecedent exercise of the trial court's authority to submit or to withhold the submission of lesser offenses or defenses. But it blinks reality to suppose that trial judges, any more than appellate judges, can regularly and uniformly avoid the temptation described by Mr. Justice Jackson: "to strain the

be justified but may be reduced to voluntary manslaughter under the doctrine of "mutual combat," *see Williams* v. *State, supra,* 206 S.E.2d at 38, *Grant* v. *State,* 120 Ga. App. 244, 170 S.E.2d 55, 56 (1969).

[90] *See, e.g., Ross* v. *State,* 135 Ga. App. 169, 217 S.E.2d 170 (1975); *Brown* v. *State,* 228 Ga. 215, 184 S.E.2d 655 (1971).

[91] See BLACK, *op. cit. supra* note 26, at 50-55; GOLDSTEIN, THE INSANITY DEFENSE 44-46 (1967). In Georgia, insanity is not isolated as an issue for separate jury determination, but in reaching its general verdict the jury must find beyond a reasonable doubt that the defendant knew right from wrong. *Revill* v. *State,* 235 Ga. 71, 218 S.E.2d 816 (1975). The defendant is only required to show to "the reasonable satisfaction of the jury," *id.* at 818, that he lacked the requisite mental capacity. But what may "satisfy" the jury or the law can vary widely: uncontradicted psychiatric testimony of medical psychosis will not necessarily suffice, *see Chenault* v. *State,* 234 Ga. 216, 215 S.E.2d 223 (1975), whereas "the [criminal] act itself may be so utterly senseless and abnormal as to furnish satisfactory proof of a diseased mind," *Brown* v. *State,* 228 Ga. 215, 184 S.E.2d 655, 658 (1971).

[92] KALVEN & ZEISEL, *op. cit. supra* note 88, at 448-449.

evidence and even, in close cases, the law" in order to give a man with his life at stake in a doubtful case "another chance." *Stein* v. *New York,* 346 U.S. 156, 196 (1953). How great the strain will be depends, of course, upon the particular judge, the particular case, and why it is deemed doubtful. Here, once again, any hope of regularity in the life-or-death deciding process is delusive.

4. Executive Clemency.

The capital defendant who fails to escape the death penalty during the charging, plea bargaining, guilt-and-degree-determining, and sentencing processes is subject to a final lottery in which the Executive Department has an absolute discretion to spare his life or to permit his execution. The five member Board of Pardons and Paroles[93] has the authority to commute a death sentence, by a majority vote,[94] "except in cases in which the Governor refuses to suspend a sentence of death." Georgia Const., Ann. §2-3011 (1972); Ga. Code Ann. §77-511 (1972). No direction is given to the Governor in the determination whether to suspend sentence, or to the members of the Board in the determination whether to commute a sentence. It is merely provided that the Governor and the Board communicate to the General Assembly each act of

[93] Ga. Code Ann. §77-501 (1972). Appointments to the Board are "made by the Governor and shall be subject to the confirmation of the Senate." Ga. Const. Ann. §2-3011 (1972).

[94] The Georgia Constitution provides that ". . . in all cases a majority shall decide the action of the board." Ga. Constitution Ann. art. V, §2-3011 (1972). Georgia Code Ann. §77-513 (1975 Supp.) provides that "three members of . . . [the Board] may commute a death sentence to life imprisonment." (Ga. Code Ann. §77-511 (1972), which has not been amended since the Board was increased from three to five members in 1973, Ga. Code Ann. §77-501 (1973), provides, inconsistently, that "the board by an affirmative vote of two of its members shall have the power to commute a sentence of death to one of life imprisonment.")

clemency and the reasons therefor, Ga. Const. Ann. §2-3011 (1972), and that commutations be made "by a written decision." Ga. Code Ann. §77-513 (1975 Supp.). Courts of the State have "no jurisdiction" to review the arbitrary granting or denial of executive clemency in a death case. *Parks* v. *State*, 206 Ga. 675, 58 S.E.2d 142, 145 (1950).

In the eighteen years between 1946 and 1963, 43 death sentences were commuted in Georgia, while 146 were executed.[95] Thus the ranks of the condemned are further winnowed by the exercise of a power which, albeit merciful, is not and cannot be constrained by any bounds or principles of regularity.

• • •

The system we have just described is not an orderly one, even on paper. Obviously, it will be immeasurably more disorderly in the flesh. Its caprices and irregularities arise in part from the studied purpose of the Georgia legislature to retain an arbitrary discretion in capital sentencing. In another, perhaps preponderate part, they arise from the basic irrationality of the punishment which the system seeks to administer, and from the difficulty of providing for its administration in a society to which it is intolerable except in aberrant and unpredictable cases.[96] In still another part, the disorders of the system are those common to any administration of human justice.

But *this* system is designed to take life. It proposes to take the petitioner's life. Whatever the precise sources of its deficiencies, they cannot be condoned upon the ground that they merely share a common human insufficiency for that purpose. They cannot be condoned on the ground that

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[95] Note, *Executive Clemency in Capital Cases*, 39 N.Y.U. L. Rev. 136, 192 (1964).

[96] See Part III of the Brief for Petitioner in *Jurek* v. *Texas*, No. 75-5394.

it is difficult to decide whom to kill. The difficulty of the decision is an adequate reason to forbear it. It is not an acceptable reason to make the decision to kill arbitrarily.

Furman v. *Georgia* held, at the very least, that arbitrarily inflicted sentences of death are cruel and unusual punishments. That holding condemns Georgia's present capital sentencing procedures and petitioner Gregg's sentence of death.

III

The Excessive Cruelty of Death

The submissions made in Part III of Petitioner's *Fowler* Brief, at pp. 102-140, and in Part III of the Brief for Petitioner, *Jurek* v. *Texas*, No. 75-5394, are fully applicable to death sentences inflicted under Louisiana law. Petitioner respectfully urges their consideration by the Court.

CONCLUSION

The penalty of death imposed upon petitioner Troy Leon Gregg is a cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. The judgment of the Supreme Court of Georgia should therefore be reversed insofar as it affirms his death sentence.

Respectfully submitted,

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APPENDIX

APPENDIX

Persons Under Sentence of Death in the State of Georgia*

1. *Roland Tamplin* (black), sentenced to death for murder, September 11, 1975, DeKalb County Super. Ct. *aff'd*, 235 Ga. 20, 218 S.E.2d 779 (1975).
2. *James Spencer* (black), sentenced to death for murder, July 15, 1975, Burke County Super. Ct., No. 1189 *appeal pending*, Sup. Ct. of Georgia, No. 30609.
3. *Billy Birt* (black), sentenced to death for murder, June 19, 1975, Jefferson County Super. Ct. *appeal pending*, Sup. Ct. of Georgia, No. 30638.
4. *Samuel Gibson* (black), sentenced to death for murder, May 15, 1975, Jones County Super. Ct., No. 3835 *appeal pending*, Sup. Ct. of Georgia, No. 30761.
5. *Jill Shaw* (white), sentenced to death for murder, May 14, 1975, Jones County Super. Ct., No. 3835.
6. *Grady Arnold* (black), sentenced to death for murder, May 2, 1975, Fulton County Super. Ct., No. A-26437.
7. *Kenneth Harris* (white), sentenced to death for murder, March 13, 1975, DeKalb County Super. Ct., No. 17784.
8. *William Moore* (black), sentenced to death for murder, February 12, 1975, Jefferson County Super. Ct., No.

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* Transfer of death sentenced prisoners from county jails to the Georgia State Prison at Reidsville is often considerably delayed. This list, which includes inmates housed in the Georgia State Prison at Reidsville and other inmates whose death sentences have come to our attention, may therefore exclude a substantial proportion of the Georgia death row population.

74-6547 *aff'd* 233 Ga. 861, 213 S.E.2d 829 (1975) *pending on petition for certiorari* No. 74-6547.

9. *Guy Mason* (black), sentenced to death for murder, January 22, 1975, Baldwin County Super. Ct., No. 28447 *aff'd* No. 30338, Sup. Ct. of Georgia, December 2, 1975 (slip opinion).

10. *Michael Berryhill* (white), sentenced to death for murder, January 9, 1975, Bartow County Super. Ct., No. 32699 *appeal pending,* Sup. Ct. of Georgia, No. 30173.

11. *George Street* (black), sentenced to death for murder, January 8, 1975, Pierce County Super. Ct., No. 617 *appeal pending,* Sup. Ct. of Georgia, No. 30644.

12. *Alpha O. Stephens* (black), sentenced to death for murder, November 17, 1974, Bleckley County Super. Ct. No. 6713.

13. *Curfew Davis* (black), sentenced to death for murder, November 12, 1974, Troup County Super. Ct., No. 124-620 *appeal pending,* Sup. Ct. of Georgia, No. 30636.

14. *William Mitchell* (black), sentenced to death for murder, November 5, 1974, Worth County Super. Ct., No. *aff'd* 234 Ga. 160, 214 S.E.2d 900 (1975) *pending on petition for certiorari,* No. 75-5022.

15. *Ehrlich Coker* (white), sentenced to death for rape, October 18, 1974, Ware County Super. Ct., No. 5097 *aff'd* 234 Ga. 555, 216 S.E.2d 782 (1975) *pending on petition for certiorari,* No. 75-5444.

16. *Marcus Chenault* (black), sentenced to death for murder, September 12, 1974, Fulton County Super. Ct., No. A22379 *aff'd* 234 Ga. 216, 215 S.E.2d 223 (1975).

17. *Willie Dobbs* (black), sentenced to death for murder, May 22, 1974, Walker County Super. Ct., No. 8403 *appeal pending,* Sup. Ct. of Georgia, No. 30453.

18. *Timothy McCorquodale* (white), sentenced to death for murder, April 21, 1974, Fulton County Super. Ct., No. A-20205 *aff'd* 233 Ga. 369, 211 S.E.2d 570 (1974) *pending on petition for certiorari,* No. 74-6557.

19. *Gary Floyd* (white), sentenced to death for murder, April 10, 1974, Fulton County Super. Ct., No. A-19628 *aff'd* 233 Ga. 280, 210 S.E.2d 810 (1974).

20. *David Jarrell* (white), sentenced to death for murder and kidnapping, March 14, 1974, Gwinnett County Super. Ct., No. 95107 *aff'd* 234 Ga. 410, 216 S.E.2d 258 (1975) *pending on petition for certiorari,* No. 74-6736.

21. *Willie Ross* (black), sentenced to death for murder, March 13, 1974, Colquitt County Super. Ct., No. 51-71 *aff'd* 233 Ga. 561, 211 S.E.2d 356 (1974).

22. *Troy Gregg* (white), sentenced to death for murder, February 8, 1974, Gwinnett County Super. Ct., No. 9489 *aff'd* 233 Ga. 117, 210 S.E.2d 659 (1974) *cert. granted* 44 U.S.L.W. 3439, January 22, 1976.

23. *Wayne Coleman* (white), sentenced to death for murder, January 18, 1974, Seminole County Super. Ct., No. 439.

24. *George Dungee* (black), sentenced to death for murder, January 9, 1974, Seminole County Super Ct., No. 444.

25. *Carl Isaacs* (white), sentenced to death for murder, January 3, 1974, Seminole County Super. Ct., No. 449.

26. *John Eberheart* (black), sentenced to death for rape and kidnapping, December 2, 1973, Cook County Super. Ct., No. 28776, *aff'd* 232 Ga. 247, 206 S.E.2d 12 (1974), *pending on petition for certiorari,* No. 74-5154.

27. *Jack House* (white), sentenced to death for murder, July 11, 1973, Fulton County Super. Ct., No. CA-16814, *aff'd* 232 Ga. 140, 205 S.E.2d 217 (1974), *pending on petition for certiorari,* No. 74-5196.

28. *John Hooks* (black), sentenced to death for rape, December 10, 1973, Cook County Super. Ct., No. 9859, *aff'd* 233 Ga. 117, 210 S.E.2d 668 (1974), *pending on petition for certiorari,* No. 9859.

MOTION FILED

FEB 25 1976

IN THE

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1976 Term

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Respondent.

No. 75-5394

JERRY LANE JUREK,

vs. *Petitioner,*

THE STATE OF TEXAS,

Respondent.

No. 75-5491

JAMES TYRONE WOODSON and LUBY WAXTON,

vs. *Petitioners,*

THE STATE OF NORTH CAROLINA,

Respondent.

No. 75-5706

CHARLES WILLIAM PROFFITT,

vs. *Petitioner,*

THE STATE OF FLORIDA,

Respondent.

No. 75-5844

STANISLAUS ROBERTS,

vs. *Petitioner,*

THE STATE OF LOUISIANA,

Respondent.

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF GEORGIA, THE TEXAS COURT OF CRIMINAL APPEALS, AND THE SUPREME COURTS OF NORTH CAROLINA, FLORIDA, AND LOUISIANA, RESPECTIVELY

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* AND BRIEF OF AMNESTY INTERNATIONAL AS *AMICUS CURIAE*

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TABLE OF CONTENTS

	PAGE
Table of Authorities	ii
Motion for Leave to File Brief of *Amicus Curiae*	2
Interest of the *Amicus Curiae*	2
Brief of *Amicus Curiae*	5
ARGUMENT:	
I.—In the absence of authoritative legislative guidance, the Court, in deciding the death penalty question, makes a moral decision which can determine a standard of the humane governance of society if founded on the sanctity of the right to life	6
II.—The Court has a unique opportunity to fulfill a dual role (a) in following the lead of other humane nations in abolishing the death penalty and (b) in serving as a leader to other nations which have not yet abolished the death penalty	9
III.—The United Nations Charter, interpreted through the Universal Declaration of Human Rights and the Covenant on Civil and Political Rights, promotes the humane governance of society and thus, the abolition of the death penalty in the United States	13
CONCLUSION	18
APPENDIX	A-1

TABLE OF AUTHORITIES

PAGE

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A. F. of L. v. *American Sash and Door Co.*, 335 U.S. 538 (1949) 10

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Hurd v. *Hodge*, 334 U.S. 24 (1948) 13

Kennedy v. *Mendoza-Martinez*, 372 U.S. 159 (1963) 17

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The Paquette Habana, 175 U.S. 677 (1900) 9

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PAGE

I.C.J. Stat. Art. 38 15

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vs.

THE STATE OF FLORIDA,

Respondent.

No. 75-5844

STANISLAUS ROBERTS,

Petitioner,

vs.

THE STATE OF LOUISIANA,

Respondent.

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF GEORGIA, THE TEXAS COURT OF CRIMINAL APPEALS, AND THE SUPREME COURTS OF NORTH CAROLINA, FLORIDA, AND LOUISIANA, RESPECTIVELY

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* AND BRIEF OF AMNESTY INTERNATIONAL AS *AMICUS CURIAE*

Motion for Leave to File Brief

Annesty International, by its attorney, Arthur M. Michaelson, moves for leave to file a brief *Amicus Curiae* in support of petitioners.

Interest of the *Amicus Curiae*

The *Amicus Curiae*, Amnesty International, is a nonpartisan private international humanitarian organization which works to secure for all persons the right freely to hold and express their convictions as guaranteed in the United Nations Universal Declaration of Human Rights.

Article 1 of Amnesty International's Statute (copy attached as Appendix A), as amended September 8, 1974, reads in pertinent part:

> CONSIDERING that every person has the right freely to hold and to express his convictions and the obligation to extend a like freedom to others, the objects of AMNESTY INTERNATIONAL shall be to secure throughout the world the observance of the provi-

> sions of the Universal Declaration of Human Rights, by:
>
> • • •
>
> (c) opposing by all appropriate means the imposition and infliction of death penalties and torture or other cruel, inhuman or degrading treatment or punishment of prisoners or other detained or restricted persons whether or not they have used or advocated violence.

Amnesty International was founded in London in 1961 and now has national sections in over thirty countries, including the United States, with approximately 50,000 individual members in some sixty countries.

Amnesty International has formal consultative status with the United Nations, UNESCO, the Organization of American States, the Council of Europe, the Interamerican Commission of Human Rights, and in regard to refugees, the Organization of African Unity. Many members of these organizations (e.g. the United Nations, UNESCO, the Council of Europe and the Organization of American States) have abolished the death penalty *de jure;* others have *de facto* stopped executions. It also is the worldwide experience of Amnesty International that the death penalty is applied in a highly discriminatory fashion against ethnic and religious minorities, against political prisoners, against the disadvantaged.

Amnesty International does not approve of and would not defend any violent crime. However, it cannot regard the death penalty other than as an anachronism and an act of cold blood beneath the dignity of a modern state.

Amnesty International frequently appeals to governments not to impose, or to commute, sentences of death upon "political" criminals. It believes that if the death penalty were abolished in the United States, other nations would be greatly influenced to follow in the same course.

Accordingly, Amnesty International moves for leave to file the following brief as *amicus curiae.*

Respectfully submitted,

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EILEEN LACH
On the Brief

IN THE

Supreme Court of the United States

1976 Term

—o—

No. 74-6257

TROY LEON GREGG, *Petitioner,*

vs.

THE STATE OF GEORGIA, *Respondent.*

No. 75-5394

JERRY LANE JUREK, *Petitioner,*

vs.

THE STATE OF TEXAS, *Respondent.*

No. 75-5491

JAMES TYRONE WOODSON and LUBY WAXTON, *Petitioners,*

vs.

THE STATE OF NORTH CAROLINA, *Respondent.*

No. 75-5706

CHARLES WILLIAM PROFFITT, *Petitioner,*

vs.

THE STATE OF FLORIDA, *Respondent.*

No. 75-5844

STANISLAUS ROBERTS, *Petitioner,*

vs.

THE STATE OF LOUISIANA, *Respondent.*

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF GEORGIA, THE TEXAS COURT OF CRIMINAL APPEALS, AND THE SUPREME COURTS OF NORTH CAROLINA, FLORIDA, AND LOUISIANA, RESPECTIVELY

—o—

BRIEF OF AMNESTY INTERNATIONAL AS *AMICUS CURIAE*

ARGUMENT

I.

In the absence of specific constitutional direction, the Court, in deciding the death penalty question, makes a moral decision which can determine a standard of the humane governance of society if founded on the sanctity of the right to life.

The issue of the death penalty presents the court with a question devoid of specific constitutional direction. There is no explicit language by which the Court is to be governed, but rather it must interpret the Eighth and Fourteenth Amendments. Judicial interpretation which results in law is a process of value realization, a reflection of standards of and for the community.[1] Consequently, in an area such as the issue of the death penalty, the Court is left to determine an aspect of the humane evolution of society.[2]

The abolition of the death penalty is a useful standard of development for a nation which historically has pronounced and demonstrated its concern for human rights law. It is also a valid indicator by which a society may measure its humanity. The acceptance or rejection of the

[1] For a brief summaries and views of law as a value-realizing process see Cahn, *The Moral Decision* (1955); McDougal, *The Law School of the Future; from Legal Realism to Policy Science in the World Community,* 56 YALE L.J. 1345, 1345-50 (1947). A similar perspective concerning internationally significant issues and their relation to domestic courts can be found in R. FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER (1964).

[2] The Court has assumed this task in many notable decisions, e.g. *Powell* v. *Alabama,* 287 U.S. 45 (1932); *Shelley* v. *Kraemer,* 334 U.S. 1 (1948); *Brown* v. *Board of Education,* 247 U.S. 483 (1954).

humane standard is a moral question which concerns both the sanctity of life and the humane governance of a nation.[3]

The dignity of human life and the right to life have had a history of legal recognition.[4] Other extended rights have been predicated on the basic right to life, tending to show the inalienability of the right.[5]

The possibility of mistake accentuates a realization of

[3] The Secretary-General of the United Nations noted:

> The debate on the death penalty continues to revolve around two main questions of its morality and its usefulness. The moral issue is the right of any society to put any person to death, i.e. to deny him his basic human rights to live. The question of the utility of capital punishment turns essentially on its efficiency in preventing crime.

He also observed:

> In some respects it is surprising that these [moral and utilitarian] issues of principle are not yet settled . . .

UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, Report of the Secretary-General, *Capital Punishment* (E/5242) 4 and 3 (February 23, 1973). Also reprinted in UNITED NATIONS, 31 INT'L REV. CRIM. POL'Y 91, 92 (1974) [hereinafter Secretary-General's Report 1973].

[4] See Point III *infra,* concerning the provisions and acceptance of the United Nations Charter, the International Bill of Human Rights and the Vienna Convention on the Law of Treaties.

[5] Note, for example, the predicative assumptions of *The World Food Conference Declaration on the Eradication of Hunger and Malnutrition,* U.N. Doc. SEC/E. 75 II.A.3, 1 (1974) meeting under the authorization of CONST. U.N. FOOD AND AGRICULTURAL ORGANIZATION (FAO), Oct. 16, 1945, 12 U.S.T. 980, T.I.A.S. No. 4803:

> Recognizing that:
>
> The grave food crisis that is afflicting the peoples of the developing countries where most of the world's hungry and ill-nourished live and where more than two-thirds of the world's population produce about one third of the world's food . . . is not only fraught with grave economic and social implications, but also acutely jeopardizes the most fundamental principles and values associated with the right to life and human dignity as enshrined in the Universal Declaration of Human Rights.

the sanctity of life which no temporal process is empowered to abridge. Camus points out this basic concept:[6]

> A classic treatise of French law, in order to excuse the death penalty for not involving degrees, states this: "Human justice has not the slightest desire to assure such a proportion. Why? Because it knows it is frail." Must we, therefore, conclude that such frailty authorizes us to pronounce an absolute judgment and that, uncertain of ever achieving pure justice, society must rush headlong, through the greatest risks, toward supreme injustice? . . . Compassion does not exclude punishment, but it suspends the final condemnation. Compassion loathes the definitive, irreparable measure that does an injustice to mankind as a whole . . .

The limitation on the power of and potential for abuse by the state follows from the recognition of the sacredness of life free from the ultimate interference of a state-imposed death penalty. A society is entitled to choose the means by which it protects its citizens. However, the means selected under a system of humane governance should be limited to methods which positively deter criminal behavior. It is not clear that the death penalty fulfills that—

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[6] A. CAMUS, *Reflections on the Guillotine,* in RESISTANCE, REBELLION AND DEATH 131, 165-66 (Mod. Lib. 1960). See A. KOESTLER, REFLECTIONS ON HANGING (Victor Gollancz, Ltd. 1956). See also C. DARROW, THE NEGATIVE OF DEBATE RESOLVED: THAT CAPITAL PUNISHMENT IS A WISE PUBLIC POLICY, 41 (1924).

or any—utilitarian purpose.[7] Human rights law, from Magna Carta onward, serves to limit the abuse of individuals by the national power. The conception of a society under a humane system of government has evolved since that time, through legal decisions which shape human rights standards. In the absence of specific constitutional imperatives, the Court in this group of cases decides a profound question of humane societal governance and standards of human rights. A cognizance of the right to life is fundamental to the decision.

II.

The Court has a unique opportunity to fulfill a dual role (a) in following the lead of other humane nations in abolishing the death penalty and (b) in serving as a leader to other nations which have not yet abolished the death penalty.

The Court has long been sensitive to the imperatives "of this country's status and membership in the community of nations".[8] Within the context of its deliberations on

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[7] UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, Report of the Secretary-General, *Capital Punishment* (E/5616) 4 (February 12, 1975) [hereinafter Secretary-General's Report 1975] states:

> In the past the United Nations has considered most of the problems involved in capital punishment. The focus in the UN reports on capital punishment of 1962 and 1967 was on the deterrent effect of the death penalty. The conclusion of these reports was that no significant differences between the rates of capital offenses could be found before and after the abolition of the death penalty in abolitionist countries. They also indicated that in general, no significant differences could be found in the rates of capital offences in countries with capital punishment and those in countries without it.

Commonwealth v. *O'Neal,* No. 3502 (Mass. Sup. Jud. Ct., Dec. 22, 1975). See BOWERS, EXECUTIONS IN AMERICA 160 (1974); KAKOULLIS, THE MYTHS OF CAPITAL PUNISHMENT (Center for Responsible Psychology, Brooklyn College, C.U.N.Y.) Report No. 13, 1974.

[8] *The Paquette Habana,* 175 U.S. 677, 700 (1900).

other international issues, it has been mindful of the practices of other nations.[9] In fact, there is precedent for the Court to survey international practices and policy in forming judgments as to the cruelty of punishments.[10]

The practices and policies of the Western European nations, the group of nations with which the United States readily identifies in its juridico-cultural heritage, provide guidance in their commitment to humane standards in the abolition of capital punishment.[11] This is particularly significant in a violent world where, as the United Nations has noted:

> As new forms of terror and violence evolve in society, the tendency to revert to the death penalty as the main deterrent is conspicuously increased.[12]

The overwhelming majority of European nations have abolished the death penalty *de jure* or *de facto* for "ordinary crimes"[13] as a minimum.[14] Legislation in Europe within the past ten years has displayed an increasing trend toward total abolition of the death penalty.[15] Several

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[9] See, e.g. *A.F. of L.* v. *American Sash and Door Co.*, 335 U.S. 538, 548 (1949), in which the Court considered collective bargaining, "in the light of the experience of countries advanced in industrial democracy, such as Great Britain and Sweden".

[10] *Trop* v. *Dulles*, 356 U.S. 86, 103 (1958) which concerns whether loss of citizenship due to military desertion is cruel and unusual punishment.

[11] The following discussion of Western European *de jure* and *de facto* abolition is limited to those situations similar to the facts of the cases presently before the Court. We do not consider herein the use of the death penalty for acts of terrorism, treason, state assassination or political acts related to the security of the state in times of war or extreme national turbulence. The Secretary-General's Report 1973 refers to the excluded class as "political" offenses. The remainder constitute "ordinary" crimes. Secretary-General's Report 1973, 9, 94.

[12] Secretary-General's Report 1973, 4, 92.

[13] See note 11, *supra*.

[14] A total of twenty-two nations have abolished capital punishment since 1863. Those in Western Europe are: Austria, *de jure* in 1945; Belgium, *de facto;* Denmark, *de jure* in 1930 for ordinary crimes; Finland, *de jure* in 1949; Federal Republic of Germany, *de jure* in 1949; Iceland, *de jure* in 1928; Italy, *de jure* in 1944 for ordinary crimes; Luxembourg, *de facto* with no executions for at least 40 years; Netherlands, *de jure* in 1870 for ordinary crimes; Norway, *de jure* in 1905 for ordinary crimes; Portugal, *de jure* in 1867 for ordinary crimes; Sweden, *de jure* in 1921; United Kingdom, *de jure* in 1969 for ordinary crimes. For a definition of "ordinary", see note 11, *supra*. Secretary-General's Report 1975, Tables 1 and 2.

For a history of Western European abolition of capital punishment, see M. ANCEL, THE DEATH PENALTY IN EUROPEAN COUNTRIES (Council of Europe 1962).

[15] In 1973 Denmark, which since 1930 had retained the death penalty only in time of war, amended the Military Criminal Code to limit the scope of criminal offenses for which the death penalty could be imposed. UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, Report of the Secretary-General Addendum, *Capital Punishment* (E/5616/Add. 1) 1-2 (April 18, 1975).

In 1921 Sweden abolished *de jure* the death penalty in times of peace. From July 1, 1973 it extended the abolition to wartime as well, thus becoming the tenth nation to completely abolish the death penalty. Secretary-General's Report 1975, 7.

The United Kingdom abolished the death penalty for an experimental period by the Death Penalty Act of 1965, and made the action permanent by affirmative resolutions of both Houses of Parliament in 1969. A capital offense under the Dockyards Protection Act of 1792 was repealed by the Criminal Damage Act of 1971. These reforms occurred despite a considerable upsurge in terrorism. *Ibid.*

In February 1968, Austria abolished the death penalty for the execptional crimes to which it could still be applied. Secretary-General's Report 1973, 10.

On June 1, 1972, Finland abolished the death penalty during wartime, the only time it had previously been allowed. *Ibid.*

European nations have, in fact, incorporated the abolition of the death penalty into their national constitutions.[16] This state of affairs has led the United Nations Counsel on Economics and Social Affairs to observe that:

> . . . in the period 1969-1973 further progress has been made in some countries by abolishing capital punishment either totally or for ordinary crimes, or by suspending it, or by restricting the number of capital offences . . .[17]

The overwhelming abolition of the death penalty in Western Europe provides the Court with a sound model for a decision holding capital punishment unconstitutional. The example of other societies which have adopted this aspect of a commitment to humane standards urges such a decision and supports its moral rightness.

The Court in the present case has a second unique opportunity to affect the leadership capacity of the United States in global affairs. All but 22 countries[18] currently allow for the death penalty. If the United States, preeminent in physical power among the nations, joined the ranks of those humane states which have abolished capital punishment, it could not fail to positively influence a reconsideration of the death penalty among its remaining adherents.

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[16] For example, Austria, West Germany, Italy and Portugal. For the texts of these and other constitutional abolition provisions, see A. PEASLEE, CONSTITUTIONS OF NATIONS (The Hague, M. Nijhoff 1956).

[17] UNITED NATIONS ECONOMIC AND SOCIAL COUNCIL, Report of the Social Committee, *Social Development Questions*, (E/5664) 6 (April 25, 1975).

[18] See note 14, *supra*.

III.

The United Nations Charter, interpreted through the Universal Declaration of Human Rights and the Covenant on Civil and Political Rights, promotes the humane governance of society and thus, the abolition of the death penalty in the United States.

Chronologically, the Court's recognition of the relevance of international legal considerations to domestic adjudications[19] followed the creation of the United Nations Organization and United States adherence to the Charter. The Court has noted that under Articles 55C and 56 of the Charter "we have pledged ourselves to cooperate with the United Nations to promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."[20] The "good faith" clause of the Charter,

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[19] *Hurd* v. *Hodge*, 334 U.S. 24, 34-35 (1948).

[20] *Oyama* v. *California*, 332 U.S. 633, 649 (1948) (Black, *J.*, concurring). Article 55 of the Charter of the United Nations, June 26, 1945, 59 Stat. 1031 (1945), T.S. No. 993 (effective Oct. 24, 1945), reads in relevant part:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
>
> * * *
>
> c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56 reads:

> All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of purposes set forth in Article 55.

The records of the San Francisco meetings on the drafting of the Charter illustrate that the framers attached importance to the words "separate action". The qualifying words "in cooperation" were intended to prevent direct United Nations intervention in domestic affairs rather than to limit the obligation of member nations to observe human rights. See GOODRICH, HAMBRO AND SIMONS, CHARTER OF THE UNITED NATIONS, 380-82 (3rd ed. 1969).

Article 2,[21] has been applied in practice by the Court in invalidating an Alien Land Law which prohibited land ownership by Japanese.[22] Although unmentioned by the Court, its decision was consistent with an act of the General Assembly in which that body had voted in a 1946 Resolution on Persecution and Discrimination, to call "on the Governments . . . to conform both to the letter and to the spirit of the Charter."[23]

Alternative methods exist to read general provisions in terms of more specific human rights to be protected under the United Nations Charter. A right to individual freedom from capital punishment may be interpreted through a principle of construction similar to that articulated by the Court in *Bacardi Corp.* v. *Domenech,* 311 U.S. 150, 163 (1940):

> According to the accepted canon, we should construe the treaty liberally to give effect to the purpose which animates it. Even where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred.

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[21] U.N. CHARTER art. 2, para. 2:

> All members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.

[22] *Oyama* v. *California,* 332 U.S. at 673 (Murphy, *J.*, concurring):

> The Alien Land Law stands as a barrier to the fulfillment of that national pledge [to the United Nations Charter]. Its inconsistency with the Charter, which has been duly ratified and adopted by the United States, is but one more reason why the statute must be condemned.

[23] G.A. Res. 103, U.N. Doc. A/64/Add. 1 at 200 (1946).

In the alternative, the rights sought to be protected by the United Nations Charter may be established with a reading of:

> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the applications of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.[24]

Within the human rights context, the International Bill of Human Rights[25] constitutes a subsequent agreement which reflects the general principles of law recognized by the overwhelming majority of nations and international customs of general practice. Indeed, it is commonly accepted that the Universal Declaration of Human Rights has become a part of international customary law and, in that sense, can be construed as an interpretation of the United Nations Charter.[26] Given that general interpre-

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[24] Vienna Convention on the Law of Treaties, May 22, 1969 [1972], U.N. Doc. A/Conf. 39/26 (1969), Art. 31(3) (a)-(c).

[25] The International Bill of Human Rights comprises four documents: the *Universal Declaration of Human Rights,* G.A. Res 217, U.N. Doc. A/810 at 71 (1948), and the *Covenant on Economic, Social and Cultural Rights, the Covenant on Civil and Political Rights,* and the *Optional Protocol,* G.A. Res. 2200, 21 GAOR Supp. 16, at 48, U.N. Doc. A/6316 (1966).

[26] I.C.J. Stat. Art. 38.

Evidence that the Universal Declaration of Human Rights has secured the status of international customary law is reflected generally in the country by country reporting series of the United Nations, *Yearbook on Human Rights,* U.N. Sales No. E. 48. XIV. 1.-E. 74. XIV.1. (covering 1948-1971). See the Editorial Comment by Louis B. Sohn, 62 *A.J.I.L.* 909 (1968), which reviews the accepted status of the Universal Declaration of Human Rights:

tation, support for more specific rights, like the freedom from capital punishment, can be established.

Two particular constituent elements of this customary law of the Universal Declaration of Human Rights are relevant to the issue of the death penalty, Article 3:

> Everyone has the right to life, liberty and the security of person.

and Article 5:

> no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

The right to life specified by Article 3 of the Universal Declaration of Human Rights is reaffirmed by Article 6 of the International Covenant on Civil and Political Rights[27] which provides that "Every human being has the inherent right to life. This right shall be protected by law. . . ."

The Charter of the United Nations, the Universal Declaration of Human Rights and the other unanimously adopted declarations of the United Nations have established a legislative framework for the protection of human rights throughout the world. The Montreal Statement of the Assembly for Human Rights, of March 27, 1968, expressed the general consensus of international experts that the "Charter of the United Nations, the constitutional document of the world community, creates binding obligations for Members of the United Nations with respect to human rights"; and that the "Universal Declaration of Human Rights constitutes an authoritative interpretation of the Charter of the highest order, and has over the years become a part of customary international law." Similarly, the intergovernmental Proclamation of Teheran, of May 13, 1968, emphasized that the "Universal Declaration of Human Rights states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community."

See also E. SCHWELB, HUMAN RIGHTS AND THE INTERNATIONAL COMMUNITY, THE ROOTS AND GROWTH OF HUMAN RIGHTS, 1948-1963 (1964).

[27] While the Covenant does not outlaw the use of capital punishment, it demands restrictions. Furthermore, Article 6 indicates what the trend ought to be. Article 6, paragraph 6 provides that:

> Nothing in this Article shall be invoked to delay or prevent the abolition of capital punishment by any States Party to the present Covenant.

The United Nations has considered these Articles as standards by which the legitimacy of capital punishment is to be measured.[28] Taken as standards, the Articles strongly suggest that the freedom from capital punishment is a right supported under "subsequent"[29] interpretation of the United Nations Charter. It is a right which may legitimately be recognized and protected by nations which, like the United States, have pledged to take action consistent with the thrust of the United Nations Charter which states as essential to a felicitous future for our species, "universal respect for, and observance of, human rights."[30]

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[28] UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, Commission on Human Rights (E/CN. 4/1111) 7 (February 1, 1973); UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, Commission on Human Rights (E/CN. 4/1159) 10 (January 24, 1975); Secretary-General's Report 1973, Annex II, 101.

[29] Vienna Convention on the Law of Treaties, May 22, 1969 [1972], U.N. Doc. A/CONF. 39/26 (1969), Article 31 (3) (a)-(c).

[30] Note 20, *supra*.

Although the resolutions of the General Assembly do not carry the obligations of agreements or customary practice flowing from the United Nations Charter, they provide a source of evidence on general customary law and the resolutions of important international legal issues. The Court in the past has consulted the work product of United Nations resolutions, e.g., *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 159, 161 n. 16 (1963).

Resolutions of the United Nations have "the intention . . . to promote abolition" of the death penalty. Secretary-General's Report 1973, 20, 99. The linkage to Article 3 of the Universal Declaration of Human Rights is clear:

> [I]n order fully to guarantee the right to life, provided for in Article 3 of the Universal Declaration of Human Rights, the main objective to be pursued is that of progressively restricting the number of offences for which capital punishment may be imposed with a view to the desirability of abolishing this punishment in all countries.

G.A. Res. 2857, 26 GAOR Supp. 21, at 94, U.N. Doc. A/8421 (1971).

See also *Wyatt* v. *Stickney*, 344 F.Supp. 387, 390 n. 6 (M.D. Ala. 1972) where the Court's "decision with regard to habilitation is supported not only by applicable legal authority, but also by a resolution adopted on December 27, 1971, by the General Assembly of the United Nations".

CONCLUSION

The death penalty should be abolished.

Respectfully submitted,

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APPENDIX

Statute of Amnesty International

As amended by the seventh International Council meeting in Askov, Denmark, 8 September 1974

OBJECTS

1. CONSIDERING that every person has the right freely to hold and to express his convictions and the obligation to extend a like freedom to others, the objects of AMNESTY INTERNATIONAL shall be to secure throughout the world the observance of the provisions of the Universal Declaration of Human Rights, by:

(a) irrespective of political consideration working towards the release of and providing assistance to persons who in violation of the aforesaid provisions are imprisoned, detained, restricted or otherwise subjected to physical coercion or restriction by reason of their political, religious or other conscientiously held beliefs or by reason of their ethnic origin, colour or language, provided that they have not used or advocated violence (hereinafter referred to as 'Prisoners of Conscience').

(b) opposing by all appropriate means the detention of any Prisoners of Conscience or any political prisoners without trial within a reasonable time or any trial procedures relating to such prisoners that do not conform to recognized norms to ensure a fair trial.

(c) opposing by all appropriate means the imposition and infliction of death penalties and torture or other cruel, inhuman or degrading treatment or punishment of prisoners or other detained or restricted persons whether or not they have used or advocated violence.

METHODS

2. In order to achieve the aforesaid objects, AMNESTY INTERNATIONAL shall:

(a) at all times maintain an overall balance between its activities in relation to countries adhering to the different world political ideologies and groupings;

(b) promote as appears appropriate the adoption of constitutions, conventions, treaties and other measures which guarantee the rights contained in the provisions referred to in article 1 hereof;

(c) support and publicize the activities of and cooperate with international organizations and agencies which work for the implementation of the aforesaid provisions;

(d) take all necessary steps to establish an effective organization of national sections, affiliated groups and individual members;

(e) secure the adoption by groups of members or supporters of individual Prisoners of Conscience or entrust to such groups other tasks in support of the objects set out in article 1;

(f) provide financial and other relief to Prisoners of Conscience and their dependents and to persons who have lately been Prisoners of Conscience or who might reasonably be expected to become Prisoners of Conscience if they were to return to their own countries and to the dependants of such persons;

(g) work for the improvement of conditions for Prisoners of Conscience and political prisoners;

(h) provide legal aid, where necessary and possible to Prisoners of Conscience and to persons who,

if convicted, might reasonably be considered likely to become Prisoners of Conscience and, where desirable, send observers to attend the trial of such persons;

(i) publicize the cases of Prisoners of Conscience or persons who have otherwise been subjected to disabilities in violation of the aforesaid provisions;

(j) send investigators, where appropriate, to investigate allegations that the rights of individuals under the aforesaid provisions have been violated or threatened;

(k) make representations to international organizations and to governments whenever it appears that an individual is a Prisoner of Conscience or has otherwise been subjected to disabilities in violation of the aforesaid provisions;

(l) promote and support the granting of general amnesties of which the beneficiaries will include Prisoners of Conscience;

(m) adopt any other appropriate methods for the securing of its objects.

ORGANIZATION

3. AMNESTY INTERNATIONAL shall consist of national sections, affiliated groups, individual members and corporate members.

4. The directive authority for the conduct of the affairs of AMNESTY INTERNATIONAL is vested in the International Council.

5. Between meetings of the International Council, the International Executive Committee shall be responsible for

the conduct of the affairs of AMNESTY INTERNATIONAL and for the implementation of the decisions of the International Council.

6. The day to day affairs of AMNESTY INTERNATIONAL shall be conducted by the International Secretariat headed by a Secretary General under the direction of the International Executive Committee.

7. The office of the International Secretariat shall be in London or such other place as the International Council may determine.

NATIONAL SECTIONS

8. A national section of AMNESTY INTERNATIONAL may be established in any country, state or territory with the consent of the International Executive Committee. In order to be recognized as such, a national section shall (a) consist of not less than two groups or 10 members, (b) pay such annual fee as may be determined by the International Council, (c) be registered as such with the International Secretariat on the decision of the International Executive Committee. National sections shall take no action on matters that do not fall within the stated objects of AMNESTY INTERNATIONAL. The International Secretariat shall maintain a register of national sections.

9. Groups of not less than three members or supporters wishing to adopt Prisoners of Conscience may, on payment of an annual fee determined by the International Council, become affiliated to AMNESTY INTERNATIONAL or a national section thereof. Any dispute as to whether a group should be or remain affiliated shall be decided by the International Executive Committee. An affiliated group shall accept for

adoption such prisoners as may from time to time be allotted to it by the International Secretariat, and shall adopt no others as long as it remains affiliated to AMNESTY INTERNATIONAL. No group shall be allotted a Prisoner of Conscience detained in its own country. The International Secretariat shall maintain a register of affiliated groups. Groups shall take no action on matters that do not fall within the stated objects of AMNESTY INTERNATIONAL.

INDIVIDUAL MEMBERSHIP

10. Individuals residing in countries where there is no national section may, on payment to the International Secretariat of an annual subscription fee determined by the International Executive Committee, become members of AMNESTY INTERNATIONAL. In countries where a national section exists, individuals may become members of AMNESTY INTERNATIONAL, with the consent of the national section. The International Secretariat shall maintain a register of such members.

CORPORATE MEMBERSHIP

11. Organizations may, at the discretion of the International Executive Committee and on payment of an annual subscription fee determined by the International Executive Committee, become corporate members of AMNESTY INTERNATIONAL. The International Secretariat shall maintain a register of corporate members.

INTERNATIONAL COUNCIL

12. The International Council shall consist of the members of the International Executive Committee and of representatives of national sections and shall meet at inter-

vals of approximately one year but in any event of not more than two years on a date fixed by the International Executive Committee. Only representatives of national sections and members of the International Executive Committee elected by the International Council shall have the right to vote on the International Council.

13. National sections may appoint representatives as follows:

2 - 9 groups	—	1 representative
10 - 49 groups	—	2 representatives
50 - 99 groups	—	3 representatives
100 - 199 groups	—	4 representatives
200 - 399 groups	—	5 representatives
400 groups or over	—	6 representatives

National sections consisting primarily of individual members rather than groups may in alternative appoint representatives as folows:

50 - 499	—	1 representative
500 - 2499	—	2 representatives
2500 and over	—	3 representatives

Only sections having paid in full their fees as assessed by the International Council for the previous financial year shall vote at the International Council. This requirement may be waived in whole or in part by the International Executive Committee.

14. Representatives of groups not forming part of a national section may with the permission of the Secretary General attend a meeting of the International Council as observers and may speak thereat but shall not be entitled to vote.

15. A national section unable to participate in an International Council may appoint a proxy or proxies to vote on its behalf and a national section represented by a lesser number of persons than its entitlement under article 13 hereof may authorize its representative or representatives to cast votes up to its maximum entitlement under article 13 hereof.

16. Notice of the number of representatives proposing to attend an International Council, and of the appointment of proxies, shall be given to the International Secretariat not later than one month before the meeting of the International Council. This requirement may be waived by the International Executive Committee.

17. A quorum shall consist of the representatives or proxies of not less than one quarter of the national sections entitled to be represented.

18. The Chairman of the International Executive Committee, or such other person as the International Executive Committee may appoint, shall open the proceedings of the International Council, which shall elect a chairman. Thereafter the elected Chairman, or such other person as he may appoint, shall preside at the International Council.

19. Except as otherwise provided in this statute, the International Council shall make its decisions by a simple majority of the votes cast. In case of an equality of votes the Chairman of the International Executive Committee shall have a casting vote.

20. The International Council shall be convened by the International Secretariat by notice to all national sections and affiliated groups not later than 90 days before the date thereof.

21. The Chairman of the International Executive Committee shall at the request of the Committee or of not less than one-third of the national sections call an extraordinary meeting of the International Council by giving not less than 21 days notice in writing to all national sections.

22. The International Council shall elect a Treasurer, who shall be a member of the International Executive Committee.

23. The International Council may appoint one or more Honorary Presidents of AMNESTY INTERNATIONAL to hold office for a period not exceeding three years.

24. The International Council shall from time to time, and not less than once in five years, call an International Assembly consisting of all members of AMNESTY INTERNATIONAL, of national sections and of affiliated groups. Such an Assembly shall be for the purposes of information, discussion and consultation and shall not have the power to adopt any decisions.

25. The agenda for meetings of the International Council shall be prepared by the International Secretariat under the direction of the Chairman of the International Executive Committee.

INTERNATIONAL EXECUTIVE COMMITTEE

26. (a) The International Executive Committee shall consist of the Treasurer, one representative of the staff of the International Secretariat and seven regular members, who shall be members of AMNESTY INTERNATIONAL, or of a national section, or of an affiliated group, elected by the International Council by proportional representation by the method of the single transferable vote in accordance

with the regulations published by the Electoral Reform Society. Not more than one member of any national section or affiliated group may be elected as a regular member to the Committee, and once one member of any national section or affiliated group has received sufficient votes to be elected, any votes cast for other members of that national section or affiliated group shall be disregarded.

(b) Members of the permanent staff, paid and unpaid, shall have the right to elect one representative among the staff who has completed not less than two years' service to be a voting member of the International Executive Committee. Such member shall hold office for one year and shall be eligible for re-election. The method of voting shall be subject to approval by the International Executive Committee on the proposal of the staff members.

27. The International Executive Committee shall meet not less than twice a year at a place to be decided by itself.

28. Members of the International Executive Committee, other than the representative of the staff, shall hold office for a period of two years and shall be eligible for re-election. Except in the case of elections to fill vacancies resulting from unexpired terms of office, the members of the Committee, other than the representative of the staff, shall be subject to election in equal proportions on alternate years.

29. The Committee may co-opt not more than four additional members who shall hold office for a period of one year; they shall be eligible to be re-co-opted. Co-opted Members shall not have the right to vote.

30. In the event of a vacancy occurring on the Committee, it may co-opt a further member to fill the vacancy until

the next meeting of the International Council, which shall elect such members as are necessary to replace retiring members and to fill the vacancy.

31. If a member of the Committee is unable to attend a meeting, he may appoint an alternate.

32. The Committee shall each year appoint one of its members to act as Chairman.

33. The Chairman may, and at the request of the majority of the Committee shall, summon meetings of the Committee.

34. A quorum shall consist of not less than three members of the Committee or their alternates.

35. The agenda for meetings of the Committee shall be prepared by the International Secretariat under the direction of the Chairman.

36. The Committee may make regulations for the conduct of the affairs of AMNESTY INTERNATIONAL, and for the procedure to be folowed at the International Council.

INTERNATIONAL SECRETARIAT

37. The International Executive Committee may appoint a Secretary General who shall be responsible under its direction for the conduct of the affairs of AMNESTY INTERNATIONAL and for the implementation of the decisions of the International Council.

38. The Secretary General may, after consultation with the Chairman of the International Executive Committee, and subject to confirmation by that Committee, appoint such executive and professional staff as appear to him to be

necessary for the proper conduct of the affairs of AMNESTY INTERNATIONAL, and may appoint such other staff as appear to him to be necessary.

39. In the case of the absence or illness of the Secretary General, or of a vacancy in the post of Secretary General, the Chairman of the International Executive Committee shall, after consultation with the members of that Committee, appoint an acting Secretary General to act until the next meeting of the Committee.

40. The Secretary General or Acting Secretary General, and such members of the International Secretariat as may appear to the Chairman of the International Executive Committee to be necessary shall attend meetings of the International Council and of the International Executive Committee and may speak thereat but shall not be entitled to vote.

TERMINATION OF MEMBERSHIP

41. Membership of or affiliation to AMNESTY INTERNATIONAL may be terminated at any time by resignation in writing.

42. The International Council may, upon the proposal of the International Executive Committee or of a national section, by a three-fourths majority of the votes cast deprive a national section, an affiliated group or a member of membership of AMNESTY INTERNATIONAL if in its opinion that national section, affiliated group or member does not act within the spirit of the objects and methods set out in articles 1 and 2 or does not observe any of the provisions of this statute. Before taking such action, all national sections shall be informed and the Secretary General shall also inform the national section, affiliated group or member

of the grounds on which it is proposed to deprive it or him of membership, and such national section, affiliated group or member shall be provided with an apportunity of presenting its or his case to the International Council.

43. A national section, affiliated group or member who fails to pay the annual fee fixed in accordance with this statute within six months after the close of the financial year shall cease to be affiliated to AMNESTY INTERNATIONAL unless the International Executive Committee decides otherwise.

FINANCE

44. An auditor appointed by the International Council shall annually audit the accounts of AMNESTY INTERNATIONAL, which shall be prepared by the International Secretariat and presented to the International Executive Committee and the International Council.

AMENDMENTS OF STATUTE

45. The statute may be amended by the International Council by a majority of not less than two-thirds of the votes cast. Amendments may be submitted by the International Executive Committee or by a national section. Proposed amendments shall be submitted to the International Secreariat not less than two months before the International Council meets, and presentation to the International Council shall be supported in writing by at least five national sections. Proposed amendments shall be communicated by the International Secretariat to all national sections and to members of the International Executive Committee.

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of March, A.D. 1976.

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

Nos. 74-6257, 75-5394, 75-5491, 75-5706, 75-5844

No. 74-6257

TROY LEON GREGG, *Petitioner,*

vs.

GEORGIA, *Respondent.*

No. 75-5394

JERRY LANE JUREK, *Petitioner,*

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TEXAS, *Respondent.*

(Continued on inside cover)

On Writs of Certiorari to the Supreme Court of Georgia, the Court of Criminal Appeals of Texas, and the Supreme Courts of North Carolina, Florida, and Louisiana, Respectively

BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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No. 75-5491

JAMES TYRONE WOODSON and LUBY WAXTON, *Petitioners,*

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SUBJECT INDEX

Page

Interest of Amicus Curiae 2

Summary of Argument 6

Argument 10

I

Capital Punishment Is a Form of Punishment Expressly Recognized by Provisions of the United States Constitution and by a Line of Court Decisions Spanning a Significant Part of Our Nation's Existence and the Petitioners Have Presented No Constitutional Basis for the Claim That It Now Should Be Declared to Be Cruel and Unusual Punishment in Violation of the Eighth or Fourteenth Amendments 10

A. Introduction 10

B. The Constitution and the Decisions of This Court Set the Standard of Review on the Issue of Constitutionality of the Death Penalty 12

C. Capital Punishment Is Recognized in the Constitution as a Form of Punishment Available to the People 17

D. This Court Has Recognized the Constitutionality of Capital Punishment for Over 180 Years 19

E. Congress and the Legislatures of the Various States Can Reasonably Determine That the Protection of Society Under Present Conditions Requires Death as a Form of Punishment for Certain Serious Offenses 26

Page

F. Contemporary Society Recognizes Capital Punishment as a Permissible Form of Punishment in Its Arsenal to Combat Crime 40

Conclusion 46

INDEX TO APPENDICES

Appendix A—Amendment to California Constitution [Death Penalty] .....App. p. 1

Appendix B—California Penal Code Provisions Relating to Murder 2

TABLE OF AUTHORITIES CITED

Cases Page

Aikens v. California, No. 68-5027, 403 U.S. 952, 91 S.Ct. 2280 .....2, 3

Anderson, In re, 69 Cal.2d 613, 447 P.2d 880 (1969) 3

Blodgett v. Holden, 275 U.S. 142 14

Brady v. United States, 397 U.S. 742 34

Branch v. Texas, 403 U.S. 952, 91 S.Ct. 2287 ..3, 4

Fay v. Noia, 372 U.S. 391 34

Fowler v. North Carolina, No. 73-7031 (April 21, 1975) 2, 10, 12, 31

Francis v. Resweber, 329 U.S. 459 .....15, 21

Furman v. Georgia, 403 U.S. 952, 91 S.Ct. 2282 ..3, 4, 11, 12, 14, 16, 19, 25, 28, 29, 40, 41, 43, 48

Furman v. Georgia, 408 U.S. 238 4

Goesaert v. Cleary, 335 U.S. 464 27

Jackson v. Georgia, 403 U.S. 952, 91 S.Ct. 2287 .....3, 4

Jurek v. Texas, No. 75-5394 .....10, 11

Kemmler, In re, 136 U.S. 436 .....17, 20

McGautha v. California, 402 U.S. 183 .....18, 27

McGowan v. Maryland, 366 U.S. 420 27

Newman v. United States, 382 F.2d 479 11

North Carolina v. Alford, 400 U.S. 25 35

Oyler v. Boles, 368 U.S. 448 11

Parker v. North Carolina, 397 U.S. 790 34

People v. Anderson (Crim. No. 13617), 6 Cal.3d 628, 498 P.2d 880 (1972) 3

People v. Gilbert, 63 Cal.2d 690, 408 P.2d 365 30

Page

People v. Hall, 199 Cal. 451, 249 Pac.Rptr. 859 29
People v. Love, 56 Cal.2d 720, 336 P.2d 33 39
People v. Peete, 28 Cal.2d 306, 169 P.2d 924 ..29, 30
People v. Purvis, 52 Cal.2d 871, 346 P.2d 22 30
People v. Robles, 2 Cal.3d 205, 466 P.2d 710 29
People v. St. Martin, 1 Cal.3d 524, 463 P.2d 390 .. 29
People v. Vaughn, 71 Cal.2d 406, 455 P.2d 122 .. 29
Powell v. Texas, 392 U.S. 514 .....24, 33
Robinson v. California, 370 U.S. 660 .....12, 24
State v. Jarrett, October Term, 1973, No. 73-6877
State v. Jarrett, OCtober Term, 1973, No. 73-6877
..... 30
Trop v. Dulles, 356 U.S. 86 .....
.....8, 12, 13, 14, 22, 23, 24, 25
United States v. Jackson, 390 U.S. 570 34
United States v. Wiltberger, 18 U.S. 76 14
Weems v. United States, 217 U.S. 349 ..12, 20, 21, 23
Wilkerson v. Utah, 99 U.S. 130 20
Witherspoon v. Illinois, 391 U.S. 510 .....42, 44

Rules

Rules of the Supreme Court of the United States, Rule 42(4) 2

Miscellaneous

Federal Bureau of Investigation, Uniform Crime Reports, 1973 (September 6, 1974), pp. 6-7 33
Federal Bureau of Investigation, Uniform Crime Reports, 1974 (November, 1975) 33

Page

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Act of April 30, 1790, ch. 9, Secs. 1, 3, 8, 14, 33, 1 Stat. 112 19
Act of April 2, 1792, ch. 16, Sec. 19, 1 Stat. 246 19
California Constitution, Art. I, Sec. 6 .....3, 4, 5
California Constitution, Art. I, Sec. 8 5
California Constitution, Art. I, Sec. 13 5
California Constitution, Art. I, Sec. 27 4
California Constitution, Art. VI, Sec. 11 5

Page

California Penal Code, Sec. 3046 29
Senate Bill 450 4
United States Constitution, Art. I, Sec. 1 14
United States Constitution, Art. II, Sec. 2 17
United States Constitution, Art. III, Sec. 3 17
United States Constitution, Art. V 15
United States Constitution, Fifth Amendment 7, 13, 18, 34
United States Constitution, Sixth Amendment 34
United States Constitution, Eighth Amendment .....2, 4, 5, 7, 8, 9, 10, 12 ....13, 15, 18, 19, 20, 22, 23, 24, 25, 40, 45, 46, 47
United States Constitution, Tenth Amendment 17
United States Constitution, Fourteenth Amendment 2, 4, 5, 9, 10, 13, 18, 22, 24, 46, 47

Textbooks

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Page

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IN THE

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On Writs of Certiorari to the Supreme Court of Georgia, the Court of Criminal Appeals of Texas, and the Supreme Courts of North Carolina, Florida, and Louisiana, Respectively

BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENTS

Interest of Amicus Curiae

The State of California files this amicus brief pursuant to Rule 42(4) of the Rules of the Supreme Court of the United States. The People of the State of California have a vital interest in the question presented on the grants of certiorari in these cases, that is, whether the imposition and carrying out of the sentence of death for the crime of murder under the laws of the respondent states violates the Eighth or Fourteenth Amendments to the Constitution of the United States. .... U.S. ...., ... S.Ct. ...., ... L.Ed.2d ....; 44 Law Week. 3439.

For the reasons set forth below the State of California will be affected by the ultimate disposition of the question presented for review before this Honorable Court in the above-entitled matters.

This issue was before this Honorable Court this past term in the case of *Fowler v. North Carolina*, No. 73-7031, argued April 21, 1975, and on June 23, 1975, rescheduled for argument this term. On February 23, 1976, the order rescheduling argument was revoked. The State of California filed an amicus brief in *Fowler* and set forth its position on the question at length. Reference will be made to that brief herein.

The State of California was one of the parties appearing when this issue was argued during the October 1971 term, *Aikens v. California*, No. 68-5027, reported in 403 U.S. 952, 91 S.Ct. 2280. The order granting certiorari in *Aikens* was made on June 28, 1971, and the question was stated, "does the imposition and carrying out of the death penalty in this case constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." On the same date, simi-

lar orders were made in *Furman v. Georgia*, 403 U.S. 952, 91 S.Ct. 2282; *Jackson v. Georgia*, 403 U.S. 952, 91 S.Ct. 2287; and *Branch v. Texas*, 403 U.S. 952, 91 S.Ct. 2287. In the *Aikens* case, in contrast to the other three cases, at the guilt and penalty phases in the California court, three brutal murders were proved and, in the brief for the petitioner Aikens, it was conceded "we made no claim that if the death penalty can constitutionally be inflicted for any such crime, it cannot be inflicted on this petitioner." Petitioner's Brief, *Aikens v. California*, page 5.

Aikens and the companion cases were set for argument on January 17, 1972, but about 10 days prior thereto the California Supreme Court set for argument the case of *People v. Anderson* (Crim. No. 13617), which was ultimately reported in 6 Cal.3d 628 [498 P.2d 880] (1972). In the *Anderson* case, the California Supreme Court, on February 18, 1972, held that capital punishment was unconstitutional under Article I, section 6 of the state constitution in that it came within the proscription of the cruel or unusual punishment clause thereof, finding that it was cruel and also unusual.[1]

After the *Anderson* case was decided, the suggestion was made to this Honorable Court that the *Anderson* decision mooted the issue involved in *Aikens* and that as a consequence the petition should be dismissed. Accordingly, on June 7, 1972, this Honorable Court in *Aikens v. California*, 406 U.S. 813, 814, determined, on the Suggestion of Mootness and Motion for Remand, the decision of the state court having rested on an

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[1]*Cf. In re Anderson*, 69 Cal.2d 613, 629-32 [447 P.2d 880] (1969) in which the holding was that capital punishment was *not* cruel or unusual.

adequate state ground and the holding having been determined by the California court to be fully retroactive and applying to any prisoner in the State of California under sentence of death, that the petitioner Aikens no longer faced a realistic threat of execution and that the issue upon which certiorari was granted was moot. Accordingly, the writ of certiorari was dismissed.

On June 29, 1972, this Honorable Court rendered the decision in *Furman v. Georgia* reported in 408 U.S. 238, holding that in *those* cases (*Furman, Jackson* and *Branch*) the imposition and carrying out of the death sentence was cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

Thereafter, through exercise by the People of the initiative, the Constitution of the State of California was amended, effective on November 7, 1972, to state as set forth in Article I, section 27, that the death penalty provided in the State statutes should not be deemed to be infliction of cruel or unusual punishment within the meaning of Article I, section 6, or any other provision of the state constitution. The amendment to the state constitution is attached to this brief and marked Appendix A.

Following the amendment of the state constitution and the ruling of this Honorable Court in *Furman v. Georgia, supra,* the Legislature of the State of California, by Senate Bill 450, which subsequently became Chapter 719 of the Statutes of 1973, enacted statutory provisions to reinstate the death penalty in certain circumstances. Chapter 719 became effective January 1, 1974, and the portions thereof relating to the crime of murder and the punishment therefor are attached to this brief and marked Appendix B.

Pursuant to this statute, and following the effective date thereof, approximately 43 defendants have been sentenced under its provisions and are awaiting automatic review of their appeals in the California Supreme Court. At this writing, no case has been scheduled for argument before that Court.

It is evident that the People of the State of California, by the exercise of the initiative, made clear the consensus of society as reflected in the various legislative enactments and which had been clearly indicated previously in the State Constitution[2] that capital punishment was an acceptable punishment for the most serious crimes and, of great importance, that its abolition should be effected only by the constitutional procedure provided therefor and not locked into the constitution forever by judicial edict.

Amicus contends that neither the "cruel and unusual" clause of the Eighth Amendment nor any of the provisions of the Fourteenth Amendment to the United States Constitution should now be construed as a bar to the states or to the Congress to provide the death penalty as a punishment for serious crimes.

The acceptance by this Honorable Court of the contention of the various petitioners that the Federal Constitution bars the imposition of this punishment for the crime of first degree murder implicates the statute of California, as well as the statutes of the majority of the States. Amicus is concerned that petitioners herein seek to importune this Honorable Court to "lock into" the United States Constitution the abolition of capital punishment and to place beyond the

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[2]Article I, sections 6, 8, and 13 as they then read, made reference to capital crimes. Article VI, section 11, gives the Supreme Court direct appellate jurisdiction in *capital* cases.

power of Congress and the People, through the legislatures of the several states, the right to determine that the protection of society from serious crimes requires the availability of this sanction, a dilemma which confronted the People of the State of California in November of 1972.

The State of California has been authorized by the Attorney General of Oklahoma, the Honorable Larry Derryberry, to inform the Court that the State of Oklahoma joins in this brief and in urging that the provisions of the United States Constitution do not prohibit capital punishment as a penal sanction for serious crimes.

The Attorney General of Arizona, the Honorable Bruce E. Babbitt, has authorized us to state to the Court that Arizona joins in this Amicus Brief in urging that this Court not hold State and Federal statutes providing for capital punishment to be unconstitutional.

The Honorable Paul L. Douglas, the Attorney General of Nebraska, has advised us that the State of Nebraska joins with California in this Amicus Brief and in urging the constitutionality of capital punishment.

Likewise, we are advised by the Attorney General of Nevada, the Honorable Robert List, that the State of Nevada joins in our Brief and in urging the constitutionality of legislation providing for the death penalty for serious crimes against society.

Summary of Argument

Amicus contends that capital punishment has been recognized as a permissible form of punishment since this Nation's inception and that the United States Constitution does not forbid Congress or the legislatures of the various states from providing this penal sanction for serious offenses against society.

This form of punishment was expressly referred to in the Fifth Amendment, adopted at the same time as the Eighth, and the Fifth Amendment recognized expressly what had been implied in the provisions of the Constitution as originally drafted.

The Constitution's Preamble stated an important purpose in our Union's formation: to insure domestic tranquility. The first section of Article I delegated to Congress the legislative powers and the judicial branch recognized that it was for the legislature, not the courts, to define and ordain the punishment of crime.

Amicus acknowledges that the petitioners do not quarrel with these truths. However, petitioners' argument goes as follows: it is the Judicial Branch which must determine whether an act of Congress contravenes the Federal Constitution when such a challenge is made.

Amicus does not quarrel with this concept. It is acknowledged that this function is the gravest and most delicate duty that the Court is called upon to perform.

Amicus does challenge the contention that the lack of power to declare capital punishment unconstitutional relegates the Court's function under the Eighth Amendment to "mere advice," and amicus also challenges the contention that the power to invalidate Congressional and state legislation providing for this punishment comes from a "judicially induced" finding that society has "rejected" this form of punishment and that proof of the lack of penal utility is now so "conclusively" shown that the Constitutional process of lawmaking must be bypassed and this Court must now "declare" that the punishment, provided for in

our Constitution and accepted or implied in an impressive line of decisions, is now unconstitutional under the incantation of an "evolving standards of decency" doctrine.

Petitioners cannot escape the deep-rooted history of capital punishment in this country. Likewise decisions of this Honorable Court have accepted this form of punishment as constitutional and even as late as 1958, in the case relied on for the "evolving standards" concept (*Trop,* 356 U.S. 86) it was stated that in view of its acceptability in society capital punishment could not be declared as violative of the Eighth Amendment's concept of cruelty.

In arguments that should be presented to the Legislative Branch and not the Judicial, petitioners contend that no penal purpose is served by this sanction. Amicus contends that the determination of Congress and the majority of the state legislatures that capital punishment should be available for serious offenses is amply supported. While not conceding that the People bear the "burden of proof" on the issue, it is clear that the goals of deterrence, isolation or incapacitation and retribution are served by this penal sanction.

There exist obvious flaws in the methodology of the studies upon which the abolitionist forces relied over the years and recent studies have raised serious questions about the conclusions drawn by the statistical messiahs of abolition. There are many graphic illustrations of the deterrent effect of the death penalty presented by respondents and amicus and a brief reference to this Court's decisions reveals judicial recognition. The inadequacy of "life" imprisonment as a means of isolation and incapacitation is well documented.

The petitioners' claim that this form of punishment has been "rejected" by society is ably refuted even by their own evidence. The legislatures of a majority of the states and the elected representatives of the People in Congress have acted since this Court last spoke on the issue to provide for this punishment in the effort to protect society from the violent criminal. This action is powerful evidence of the continuing recognition by the People, through their elected representatives, of the need for and the acceptability of this form of punishment by society. It is further submitted that any so-called "worldwide" trend has no relevance on any constitutional issue before this Court.

Any preoccupation of petitioners with the judicially arrested rate of executions as an indicator of popular rejection of this punishment is to ignore the much more accurate barometers of the consenus of society such as the number of defendants sent to the nation's prison systems under sentence of death over the recent years.

Amicus submits that nothing has happened in the 187-year history of the Constitution which requires this Court to today declare that the punishment, expressly recognized in our Constitution and upheld by a line of decisions spanning a good part of our nation's existence, to be in violation of the Eighth or Fourteenth Amendments.

Amicus urges this Court to recognize the action of a coordinate branch of the government and to refrain from declaring, as a Constitutional "command," that capital punishment, recognized throughout our history as a proper penal sanction, is now "cruel and unusual."

ARGUMENT

I

Capital Punishment Is a Form of Punishment Expressly Recognized by Provisions of the United States Constitution and by a Line of Court Decisions Spanning a Significant Part of Our Nation's Existence and the Petitioners Have Presented No Constitutional Basis for the Claim That It Now Should Be Declared to Be Cruel and Unusual Punishment in Violation of the Eighth or Fourteenth Amendments

A. Introduction

Amicus will direct the argument to the contention that the infliction of the punishment of death is excessive (captioned in *Fowler*, Part III, as "The Excessive Cruelty of Death"), and in violation of the Eighth or Fourteenth Amendments to the United States Constitution.[3]

Petitioners, in asserting this argument, make reference to the Petitioner's Brief in *Fowler v. North Carolina*, Part III, pp. 102-140 and to the same argument in Part III of the Petitioner's Brief in *Jurek v. Texas*, No. 75-5394.

The various procedures provided in the respective state statutes for initiating the prosecution, the disposition thereof before trial, jury determination of guilt and the exercise of executive clemency are adequately covered in the briefs of respondents in the five cases

[3]The Petitioner Fowler's Brief, Part III, pp. 102-140, is incorporated in all of the Petitioners' Briefs herein. Amicus does not have a copy of the printed briefs of petitioners and pagination of those briefs is omitted herein.

herein and in the Amicus Briefs of the Solicitor General of the United States in *Fowler* (pp. 55-77), and in these cases, and will not be elaborated on herein.

Amicus submits that *Furman* struck down the imposition and carrying out of discretionary death sentences and that it did not touch upon the other functions in our criminal justice system, referred to by the various petitioners herein as "these mechanisms" and as "a pervading network of mechanisms" (*Jurek* Brief, typewritten copy, p. 85.)

The prosecutor is a public officer charged with duties and obligations as a member of a coordinate branch of government. He can take into account special facts and circumstances of the particular case not taken into account by rigid rules. Traditionally this function has not been disturbed except where the exercise thereof has been based on a suspect or unjustifiable standard, such as race, religion, or other arbitrary classifications. *See Oyler v. Boles*, 368 U.S. 448; *Newman v. United States*, 382 F.2d 479, 480. This rule would also be applicable to pleas and other dispositions in the individual cases. *Furman* likewise was not directed at the fact-finding function of juries and this was not the "discretion" of which the Court spoke; nor was the clemency power of the executive impugned.

Petitioners have not shown any reason why these vital functions in the system of justice, and to which *Furman* was not directed, should be treated differently when a death penalty is possible. It is submitted that

in arguing such a departure from customary procedure in the federal and state systems of criminal justice petitioners read too much into *Furman. See State v. Jarrett,* 284 N.C. 625, 202 S.E.2d 721, 741-743.

B. The Constitution and the Decisions of This Court Set the Standard of Review on the Issue of Constitutionality of the Death Penalty

Under the caption "The Standard of Judicial Review" (Part III, Petitioner *Fowler's* Brief, pp. 103-121), petitioners attempt to have this Honorable Court ignore the clear mandate in the Constitution, the amendments thereto and the decisions of this Court in numerous cases throughout our history and to hold that now, because of some talisman called "evolving standards," the death penalty is forbidden to Congress and the various states by the Eighth Amendment.

It is the contention of amicus that the United States Constitution does not forbid the Congress and the various states from providing such a sanction in performing the function of affording protection to the law abiding citizens.

The petitioners would have the Court accept as a truth their assertion that retention of the power by the People, through their elected representatives to abolish or retain capital punishment relegates the function of the Court under the Eighth Amendment to "mere advice."

Such an argument ignores the exercise of the Court's Constitutional power in Eighth Amendment cases in *Weems v. United States,* 217 U.S. 349; *Trop v. Dulles,* 356 U.S. 86; *Robinson v. California,* 370 U.S. 660, etc.

This Honorable Court has never avoided its responsibility to consider, in a particular case, whether the Eighth or Fourteenth Amendments have been offended.

However, the Court has not considered itself free to read into a portion of the Constitution a meaning that is plainly at variance with its language or to inject the Court's own predelictions into the Constitution.

The Constitution, in particular the Eighth Amendment, contemplated that the People, through their elected representatives, should have the ultimate alternative of determining the punishment for crime. The intent of the Framers of the Constitution and its amendments was to bar those punishments which are both cruel and unusual either in their inherent form or grossly excessive in their application in relation to the seriousness of a particular criminal act.

It is clear, as will be developed *infra,* that the Eighth Amendment did not outlaw what had been recognized in the Fifth Amendment, adopted at the same time. The action of Congress, both before and after the addition of the Amendments, constituted contemporaneous interpretation of the acceptability of capital punishment. A line of decisions, spanning a good part of our nation's history, verify the constitutionality of this form of punishment. As recent in our history as 1958, *Trop, supra,* recognized that even though society's evolving standards may be recognized, the Court also recognized the current social acceptability of capital punishment. Certainly nothing has changed since then including the determination of the adherents of the petitioners' position, misdirected as it is to the Courts instead of to the legislatures.

One of the purposes of our Union, as stated in the Preamble to the United States Constitution, was to insure domestic tranquility. On the National level the Constitution provided that legislative powers were to be granted to the Congress (Art. I, sec. 1).

Early in the history of our nation it was determined that the power of punishment is vested in the legislative, not the judicial department. Chief Justice Marshall said (*United States v. Wiltberger,* 18 U.S. 76, 93):

> ". . . It is the legislature, not the court, which is to define a crime, and ordain its punishment."

The Constitution provided for the separation of the powers of the branches of government and this required that when an act of Congress was challenged on the ground that it contravened the Federal Constitution, the function of the Court was to determine whether the legislative action was clearly outside the Constitutional grant of power.

In making that determination this Honorable Court sits in judgment on a co-ordinate branch of government, while keeping to itself the final determination of its own power to act. This function, Mr. Justice Holmes called the gravest and most delicate duty that the Court is called upon to perform. ***Blodgett v. Holden,*** 275 U.S. 142, 148. *See Furman v. Georgia, supra,* pages 431-32, Justice Powell dissenting.

Mr. Justice Frankfurter, dissenting in *Trop v. Dulles, supra* (at 119, 356 U.S.) quoted Madison that all power is not immune from this human weakness. He said that the Court must be on guard against encroaching beyond its proper bounds and no less so since the only restraint upon itself is self-restraint.

This, he said, involves the rigorous observance of the difference between limits of power and the wise exercise of power (questions of authority and questions of precedence) and this requires the most alert appreciation of the decisive, but subtle, relationship of two concepts that too easily coalesce. No less does it require a disciplined will to adhere to the difference. It is not too easy to stand aloof and let a want of wisdom prevail, and disregard one's own strongly held view of what is wise in the conduct of affairs. But, he noted, it is not the business of the courts to pronounce policy. The Court must observe a fastidious regard for limitations on its own power and this precludes the Court's giving effect to its own notions of what is wise and politic.

Restraint is of the essence of the observation of the judicial oath, for the Constitution has not authorized judges to sit in judgment on the wisdom of what Congress and the Executive Branches do.

If there is to be any change in these constitutional concepts the Constitution contains the proper device therefor, the amendment of the Constitution as provided by Article V thereof.

For the purposes of due process it is the consensus of society's opinion that is the standard enjoined by the Constitution. In a democracy, this consensus is expressed by the legislative will of the elected representatives of the People. *Francis v. Resweber,* 329 U.S. 459, 471, Justice Frankfurter concurring.

Thus, the judgment as to the feasibility of capital punishment is one that the Constitution delegates to the Legislature. The Eighth Amendment has not in the past, nor does it now, forbid to the Congress

or the legislatures of the several states the power to determine that capital punishment can serve a proper penal purpose in the structure and framework of the criminal justice system.

Chief Justice Burger, dissenting in *Furman, supra* at 384, set the proper standard for judicial review of this matter,

> "I do not suggest that the validity of legislatively authorized punishments presents no justiciable issue under the Eighth Amendment, but, rather, that the primacy of the legislative role narrowly confines the scope of judicial inquiry. Whether or not provable, and whether or not true at all times, in a democracy the legislative judgment is presumed to embody the basic standards of decency prevailing in society. This presumption can only be negated by unambiguous and compelling evidence of legislative default."

Such evidence has not been forthcoming!

Amicus submits that there is no issue before this Court of the wisdom or social desirability of capital punishment. These are questions addressed wholly to legislators. Those who may be personally opposed to capital punishment may conclude that it violates no provision of the Constitution. The petitioner strives to wrest from the Constitution the power in the court to now declare that what was accepted as a mode of punishment for crime from the time of the inception of the Nation is no longer to be tolerated by the Constitution. This is a task of some magnitude in light of the authorities which will be reviewed.

C. Capital Punishment Is Recognized in the Constitution as a Form of Punishment Available to the People

The history of capital punishment in this country and the deep-rooted origins of that form of punishment in the religious and moral heritage of contemporary America provide clear indications that the death penalty is no barbaric relic of the past.

Execution as a form of punishment is expressly recognized by provisions of the United States Constitution. The Constitution, as originally written, contained indirect allusions to capital punishment. Among the Constitution's objectives as set forth in the preamble were to "establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity." Further evidence of the Framers' intentions is contained in Article II, section 2, giving the President power to grant reprieves (withdrawal of sentence of death) and Article III, section 3, providing that Congress shall have power to declare the punishment for treason, the common punishment then, and now in jurisdictions retaining capital punishment, being death. The specifications of these objectives suggest that the Framers intended the new federal government to have the inherent power of all governments to decree whatever customary punishments for criminal conduct were deemed necessary to protect the lives, liberties and properties of its citizens. *See In re Kemmler*, 136 U.S. 436 at 449. Absent particular prohibitions written into the Constitution, this was to be the rule. Similarly, three years later, the Tenth Amendment recognized that powers not prohibited to the states or delegated to the federal government were reserved to the respective states or to the People.

The history of the phrase "cruel and unusual punishment" and its inclusion in the first ten Amendments to the United States Constitution has been treated at length in recent opinions of this Honorable Court and in some exhaustive commentaries by scholars. *See* Granucci, "Nor Cruel and Unusual Inflicted Punishments: The Original Meaning," 57 Calif. L. Rev. 839. One fact stands out clear and was well stated by Mr. Justice Black, concerring in *McGautha v. California*, 402 U.S. 183 at 226, the Eighth Amendment's "words cannot be read to outlaw capital punishment because that penalty was in common use and authorized by law here and in the countries from which our ancestors came at the time the Amendment was adopted. It is inconceivable . . . that the framers intended to end capital punishment by the Amendment."

The first ten Amendments to the Constitution were proposed by the First Congress and in turn ratified by the States in 1791. Among these, the Fifth Amendment expressly recognized what had been implied in the provisions of the original Constitution, that death was among the forms of punishment for criminal conduct available to the federal government. The Fifth Amendment contains a mandate that "No person shall be held to answer for a *capital*, or otherwise infamous crime, unless on a presentment or indictment of the grand jury." The amendment further commands that no person "be twice put in jeopardy of *life*", nor deprived of *life*, liberty, or property, without due process of law. This language was included and made applicable to the States in 1868 by the Fourteenth Amendment.

The following chronology further refutes the contention that those who enacted the Eighth Amendment

intended thereby to abolish capital punishment. The amendment passed the First Congress on September 25, 1789. That same Congress, a mere seven months later, enacted "An Act for the Punishment of Certain Crimes Against the United States", which statute made the following offenses punishable by death by hanging: treason, murder within federal territory, piracy, and counterfeiting of public securities. *See* Act of April 30, 1790, ch. 9, §§ 1, 3, 8, 14, 33. 1 Stat. 112. The Eighth Amendment was ratified by the states on December 15, 1791, and less than four months later on April 2, 1792, the Second Congress made it a capital offense to debase coins of the United States Mint. Act of April 2, 1792, ch. 16, § 19. 1 Stat. 246.

As will be developed hereafter, the interpretation of the clause by this Court[4] confirms the conclusion that capital punishment was not prohibited to the federal government or the states by the Eighth Amendment.

D. This Court Has Recognized the Constitutionality of Capital Punishment for Over 180 Years

The subsequent history of the Eighth Amendment as it has been interpreted by this Court in 185 years of its existence likewise lends no support to the claim of petitioners that the death penalty is unconstitutional when carried out without unnecessary cruelty as punishment for a serious offense such as murder.

One of the first occasions this Honorable Court had to consider at any length the constitutional pro-

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[4]When *Furman* was before this Court, the constitutions of 48 states contained some provision against excessive punishment but, with the California experience excepted, no state court had interpreted these provisions as abolishing capital punishment.

hibition against cruel and unusual punishment was in 1878 in the case of *Wilkerson v. Utah*, 99 U.S. 130. In that case the Court upheld the mode of execution, shooting, as not forbidden by the Constitution's prohibition against cruel and unusual punishment. This Court noted the difficulty in defining "the extent of the constitutional provision" but the applicability of the provision to punishments of torture and all others involving unnecessary cruelty.

In 1890, the Court denied an application for writ of habeas corpus sought on an allegation that death by electrocution constituted a cruel and unusual punishment. *In re Kemmler*, 136 U.S. 436, 447. This Honorable Court denied the application on the grounds that the Eighth Amendment did not apply to state legislation, but added the comment:

> "Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, *something more than the mere extinguishment of life.*" (Emphasis added).

In *Weems v. United States, supra*, 217 U.S. 349, this Honorable Court in 1910, for the first time, overturned a punishment as cruel and unusual. In that case the defendant, on conviction of falsifying an official document, had been sentenced to 15 years of hard labor to be served in wrist and ankle chains with attendant life-long disabilities and a severe fine. The case arose under the Philippine Bill of Rights, whose prohibition against "infliction of cruel and unusual punishment, was taken from the Constitution of the

United States and must have the same meaning." (*Id.* at p. 367).

This Court was not troubled by the circumstance that the punishment was somewhat novel in the context of the type of punishment to which the cruel and unusual clause was thought to apply noting that the clause, like all principles "to be vital must be capable of wider application than the mischief which gave it birth." Quoting from Cooley's Constitution Limitations, the Court stated that it was probable that "any punishment declared by statute for an offense which was punishable the same way at common law could not be regarded as cruel or unusual, in a constitutional sense."

In setting aside the punishment in *Weems*, this Court noted that "there are degrees of homicide that are not punished so severely" and that the statute in question had no parallel in American legislation and came from a government of different origins. The Court found the statute "cruel in its excess of imprisonment and that which accompanies and follows punishment. It is unusual in its character. Its punishments came under the condemnation of the Bill of Rights, both on account of their degree and kind." (*Id.* at p. 377).

In 1947, the case of *Francis v. Resweber, supra*, 329 U.S. 459, was considered by the Court. In this case the issue was whether a pending second electrocution of a condemned murderer following an unsuccessful first attempt at execution constituted cruel and unusual punishment. The Court rejected the claim of unconstitutional punishment. In an opinion joined by three other members of the Court, Mr. Justice Reed, in announcing the judgment of the Court, discussed the issue under

the assumption, but not so deciding, that a violation of the Eighth Amendment would be violative of the Fourteenth Amendment's due process clause. The opinion concluded:

> "We find nothing in what took place here which amounts to cruel and unusual punishment in the constitutional sense. . . . The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence. Prohibition against the wanton infliction of pain has come into our law from the Bill of Rights of 1688. The identical words appear in our Eighth Amendment. The Fourteenth would prohibit by its due process clause execution by a state in a cruel manner.
>
> ". . . The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, *not the necessary suffering involved in any method employed to extinguish life humanely*." (*Id.* at pp. 463-64; emphasis added).

The next occasion on which this Court examined the scope of the Eighth Amendment's prohibition against cruel and unusual punishment was in 1958 in the case of *Trop v. Dulles, supra,* 356 U.S. 86, in which Chief Justice Warren, joined by three other members of the Court, concluded that denationalization of a native-born citizen for less than one day's desertion from military duty constituted unconstitutional punishment. Justice Brennan found the enactment of such punishment beyond the power of Congress to legislate. Four justices rejected both theories and would have upheld the statute upon which the denationalization was premised.

Chief Justice Warren's opinion noted that initially, "since wartime desertion is punishable by death there can be no argument that the penalty of denationalization is excessive in relation to the gravity of the crime." While recognizing the phrase cruel and unusual punishment was not precise, the opinion clarified the scope of the constitutional prohibition against such punishment by stating, "Fines, imprisonment and *even execution* may be imposed depending upon the enormity of the crime but any technique outside the bounds of these traditional penalties is constitutionally suspect." (Emphasis added.) Thus the penalty in *Weems* was characterized as meeting the two-prong test of being cruel in its excessiveness and unusual in its character, as was the penalty in the case then before the Court. Stating that the Eighth Amendment must "draw its meaning from the evolving standards of decency that mark the progress of a maturing society," Chief Justice Warren concluded that denationalization under the circumstances before the Court constituted "a form of punishment more primitive than torture." Significantly, Chief Justice Warren stated:

> "At the outset, let us put to one side the death penalty as an index of the constitutional limit of punishment. Whatever the arguments may be on capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concepts of cruelty." *Trop v. Dulles,, supra,* at 99.

Thus the opinion of the Court, while recognizing the forceful *legislative* arguments against the death

penalty, rejected the *constitutional* argument against that form of punishment.

Any doubt whether the Eighth Amendment's ban on cruel and unusual punishment applied to the states through the operation of the Fourteenth Amendment was dispelled in 1962 by the decision of this Court in *Robinson v. California,* 370 U.S. 660, which invalidated punishment of imprisonment imposed on the defendant by reason of his being found addicted to narcotics. In *Robinson* the Court's opinion focused not on the nature of the punishment, which was only 90 days in county jail, but on its inappropriateness as applied to a status, that of being a narcotic addict.

In 1968, this Honorable Court refused to extend its ruling in *Robinson* to the punishment, by a fine of $50, of a defendant convicted of the crime of being intoxicated in a public place, *Powerll v. Texas,* 392 U.S. 514. In this case the plurality opinion of the Court distinguished the punishment of status involved in *Robinson* from the punishment of the uncompelled act before the Court in *Powell.*

Seizing upon some of the language of the plurality opinion in *Trop v. Dulles, supra,* 356 U.S. 86, as proof that that decision signaled the end of the right of both the Congress and the legislatures of the various states to prescribe death as a punishment for first degree murder, the petitioners ignore the fact that the opinion in question went out of its way to recognize the Constitutional validity of the death penalty. The words that the petitioners stress are "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles, supra* at 101. To be fair to petitioners, the fixation with this phrase is understandable in view of the fact that it provides the only

arguable escape from the historical reality of capital punishment's recognition as a legitimate penalty, outside the scope of cruel and unusual punishments, in the wording of the Constitution and in the law that preceded and followed adoption of that document and the Bill of Rights.

In petitioners' attempts to avoid the impact of this history, they have failed to demonstrate that anything has transpired in the last 18 years since 1958 that has impugned the validity of the observation made by Chief Justice Warren that the death penalty "in a day when it is still widely accepted cannot be said to violate the constitutional concept of cruelty." *Trop v. Dulles, supra,* 356 U.S. 86 at 99.

Amicus contends that *Furman* did not overrule the cases discussed hereinabove or impugn their validity as proper interpretations of our Constitution. Further, that the short time since *Trop* was decided has not seen any retreat from the wide acceptance of capital punishment in this country which *Trop* recognized as foreclosing any constitutional rejection of capital punishment.

Amicus adopts the analysis of the Chief Justice in his dissenting opinion in *Furman v. Georgia, supra,* at 375-76, 396-403, that the Court did not rule capital punishment *per se* violative of the Eighth Amendment, but that the judgments in the cases before the Court were to be set aside because of discretionary sentencing practices; that the Eighth Amendment could not be construed to be a bar to the imposition of the sentence of death but that juries and judges were not to be permitted to make the sentencing determination in the same manner as they had in the past.

See also Wheeler, "Toward a Theory of Limited Punishment II: The Eighth Amendment After *Furman v. Georgia*", 25 Stan. L. Rev. 62;

"You May Kill, But You Must Promise Not to Use Discretion: Furman v. Georgia", 6 Loycla L. Rev. 526 (1973).

E. Congress and the Legislatures of the Various States Can Reasonably Determine That the Protection of Society Under Present Conditions Requires Death as a Form of Punishment for Certain Serious Offenses

The amicus contends that the death penalty does serve a vital purpose in the punishment structure of society and that this is a matter upon which the legislatures of the various states and the Congress must make the determination.

Amicus does not concede that it has the burden of providing that the death penalty is a superior deterrent by making this argument, nor that capital punishment must be established as a "more effective" punishment for crime in order that this penalty be constitutionally acceptable. It was not the intention of the Framers of the Constitution to require such a showing by Congress or the states.

The showing as to the social utility of capital punishment should be addressed to the legislative body and the burden, if any, which must be assumed in the judicial setting, is only to demonstrate that there is, in fact, a basis upon which the legislatures of the majority of the states and Congress could reasonably conclude that certain serious offenses should be punished by death.

It is a settled doctrine of constitutional law that the burden of proof is on the one who challenges

the constitutionality of a statute and that in the absence of a clear showing of unconstitutionality a state statute will be presumed valid. *McGowan v. Maryland,* 366 U.S. 420, 425-26.

Most of the arguments against capital punishment made by the petitioners are based on moral, humanitarian, and pragmatic grounds which might well prove persuasive to the Legislature in considering a change in the law or to a governor asked to commute a sentence of a condemned person, but, in this Court, the arguments must stand or fall on their own since this Court is limited to the issue of constitutionality and it cannot write into the law its notion of morality or humanitarianism or its pragmatic preferences.

As a purely constitutional matter, the analysis made by petitioners gives too little weight to the elements of retribution and deterrence and gives too much weight to "advance concepts of behavioral science." It is submitted that the constitution does not require legislatures to reflect sociological insight or shifting social standards any more than it requires them to keep abreast of the latest scientific standards.

See Goesaert v. Cleary, 335 U.S. 464, 466; *see also McGautha v. California, supra,* 402 U.S. 183, 221.

The basic elements commonly ascribed as the purposes of punishment may be reduced to four: (1) deterrence; (2) incapacitation or isolation; (3) rehabilitation; and (4) retribution.

As to rehabilitation, it is obvious that as to the serious criminal offender deemed not capable of rehabilitation and sentenced to death, this purpose of punishment is not viable.

In recent years, at least as to the non-violent offender, rehabilitation was considered the progressive goal of punishment. However, recent studies have cast much doubt on the effectiveness of rehabilitation in the penal system.

As to retribution, while it may not now be recognized as a major objective in our system of punishment, as Lord Justice Denning said,

> "The punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objectives of punishment as being deterrent or reformative or preventive and nothing else. . . . The ultimate justification of any punishment is . . . that it is the emphatic denunciation by the community of a crime; and . . . there are some murders which . . . demand the most emphatic denunciation of all, namely the death penalty." Quoted in National Commission on Reform of Federal Criminal Laws, 2 Working Papers 1359 (n. 47) (1970).

And as Mr. Justice Stewart said in his concurring opinion in *Furman v. Georgia, supra* at 308,

> "On that score I would say only that I cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment. The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment

> they 'deserve,' then there are sown the seeds of anarchy—of self-help, vigilante justice and lynch law."

One commentator (Morris R. Cohen, "Moral Aspects of Criminal Law", 49 Yale L.J. 987 at 1011-12), in discussing the retributive theory of punishment said that those who ignore this facet of punishment are only evidencing sentimental foolishness, that if the natural desire for vengeance is not met and satisfied by the orderly procedure of the criminal law there is danger of reversion to the bloody vengeance of the feud and vendetta. He also noted that rather than calling this urge of human nature to be a "passion for revenge" it could with equal aptness be termed the "passion for justice." (Cohen, "Law Without Order", p. 42.)

See also: Packer, Comment, "Making the Punishment Fit the Crime", 77 Harv. L. Rev. 1071, 1078.

One purpose of punishment is isolation or incapacitation. Despite petitioners' insistence to the contrary, life imprisonment often provides a woefully inadequate method of protecting society through incapacitation or isolation of the offender. In California, life imprisonment means the prisoner is eligible for parole after serving seven years of his term. Cal. Pen. Code § 3046. The myth that paroled or incarcerated murderers do not kill again evaporates upon a perusal of just a few of the California case reports: *People v. Robles,* 2 Cal.3d 205, 213 [466 P.2d 710, 712]; *People v. St. Martin,* 1 Cal.3d 524, 529 [463 P.2d 390, 392]; *People v. Vaughn,* 71 Cal.2d 406, 412 [455 P.2d 122, 124]; *People v. Hall,* 199 Cal. 451, 458-59 [249 Pac. Rptr. 859, 861]; *People v. Peete,* 28 Cal.2d 306, 308-

09 [169 P.2d 924, 926]; *People v. Purvis,* 52 Cal. 2d 871, 875 [346 P.2d 22, 24]; *People v. Gilbert,* 63 Cal.2d 690, 702 [408 P.2d 365, 372].

It is also to be noted that before this Court on a petition for certiorari is another case from North Carolina, *State v. Jarrett,* October Term, 1973, No. 73-6877. In this case a convicted murderer escaped and in the process of escaping, raped a black girl and stabbed to death a white youth. *See State v. Jarrett, supra,* 202 S.E.2d 721. Certainly these are a few of what are many, many examples of the inadequacy of life imprisonment to protect society from such aggressive behavior. Congress and the legislative bodies of the various states are in the best position to determine the effectiveness of a form of punishment and to conclude that for certain crimes the death penalty is the most effective method of protecting society.

It must be noted that the armed robber or armed burglar commonly faced with a maximum term of life imprisonment if apprehended might well consider himself foolish not to kill his victim or a witness if in doing so he would risk only the same penalty—life imprisonment for murder—while increasing multifold his chances of avoiding apprehension. The armed robber of the one-man liquor store would not let the petitioners' views of the dignity of human life cause him to hesitate for a moment in killing the lonely figure behind the counter at a late hour when there are no other persons around to witness such an execution. The same applies to the willingness of the armed robber to kill a police officer to avoid apprehension and conviction, when without the death penalty the criminal will risk no added punishment if he does

away with his intended captor. This would also be true of the "lifer" in a correctional facility who is faced with only another life sentence for taking the life of a guard in prison. Such a sentence would not only be futile, but would make a mockery of our system of justice.

What, then, of deterrence? Have the petitioners conclusively established that the death penalty deters no significantly greater number of persons from committing murder than does the prospect of life imprisonment?

The studies upon which petitioners rely conclude that the death penalty exerts no discernible influence on the rate of homicides. The truism that one may prove almost anything with statistics is a circumstance that makes one particularly concerned, in a matter as fraught with strong feelings as the desirability of the death penalty, that the statistician be totally objective and free of bias.

We may note that the statistical findings do not focus on the various differential factors that are operative in the various jurisdictions which they attempt to pronounce.

It has been observed that the opponents of capital punishment have been the ones who have been "active in research and prolific in their writings." (Ohio Legislative Service Commission Capital Punishment 31, Staff Research Report No. 46, 1961.)

However, this has changed in some measure now. Sellin and his disciples had been disputed in some recent surveys. The Solicitor General in the Amicus Brief in *Fowler,* No. 73-7031, referred to the Ehrlich study and his conclusion that when capital punishment

was *actually used* a significant number of lives were saved. Ehrlich, "The Deterrent Effect of Capital Punishment: A Question of Life and Death", 65 American Economic Review 397 (June 1975).

It was evident that the statistical studies that the various petitioners had relied on were "fatally flawed" in the failure to hold constant other factors besides punishment that might influence the murder rate. *See generally* Posner, "The Economic Approach to Law", 53 Texas L. Rev. 757, 766-68 (1975).

The existence of so many influential factors not susceptible of measurement and correlation would impugn the statistical methodology on which petitioners place so much reliance. Clearly the existence of these variables precludes a meaningful comparison between general undifferentiated murder statistics and a single proposed casual factor—that of the existence of the death penalty in a particular jurisdiction.

Secondly, the steady increase of homicides across the nation, presumably caused by social and economic factors, naturally tends to cover up the perceptible deterrent effects of the death penalty which might appear in the antiseptic conditions of the social laboratory.

A third objection to the statistical approach is that it measures the homicide rate in terms of the theoretical existence of the death penalty, that is, the existing statutes and judgments imposing the punishment of death, rather than in terms of the actual existence of the death penalty, that is, executions carried out. During the previous decade in which the dramatic increases in murders were recorded, while juries continued at a relatively stable rate to fix the penalty

of death in the appropriate cases, the annual number of executions in the United States dwindled to nothing. In this context, Amicus concurs with petitioners' apparent view that the death penalty would be an even greater deterrent were it not for the inordinate delay existing in the courts today which precludes the application of swift punishment to the offender. Interestingly enough, the homicide rate in California was relatively stable in the decade from 1953 to 1963. In 1963, the year of the last execution, except for the one in April of 1967, the rate was 3.8 per hundred thousand population. The rate climbed to 6.0 in 1968 and 6.9 in 1969. The current statistics are even higher and it is to be noted that nationwide, the murder increase has been marked since the judicially created moratorium on the death penalty in 1967. The period from 1968 through 1973 showed that the number of offenses of murder increased 42% and that the rate per hundred thousand inhabitants was up 35%. Federal Bureau of Investigation, Uniform Crime Reports, 1973 (September 6, 1974) at pages 6-7. *See also* Uniform Crime Reports, 1974, released November 1975.

As Justice Marshall observed in *Powell v. Texas, supra,* 392 U.S. 514 at 531, with general reference to the deterrent effect of criminal sanctions,

> ". . . The long-standing and still raging debate over the validity of the deterrence justification for penal sanctions has not reached any sufficiently clear conclusions to permit it to be said that such sanctions are ineffective in any particular context or for any particular group of people who are able to appreciate the consequences of their acts."

Amicus submits that the foregoing statement has equal validity when applied specifically to the deterrent effect of the death penalty. It would appear to be a fact that to the rational person the threat of the greater punishment has a greater deterrent effect. *See* Royal Commission on Capital Punishment Report, 1949-1953 at p. 24, sec. 68 (1953).

We must note the judicial recognition of the deterrent effect of capital punishment which is contained in the reports of this Honorable Court. *See Brady v. United States,* 397 U.S. 742, 755. This Court noted the deterrent effect of capital punishment in *United States v. Jackson,* 390 U.S. 570 at 581, when it was said that the inevitable effect of a statute providing for waiver of a jury trial to avoid possibility of a death penalty discouraged the assertion of the Fifth Amendment right to plead not guilty and that it acted to deter the exercise of the Sixth Amendment right to demand a jury trial, that such a provision "chills" the assertion of these rights by penalizing those who choose to exercise them. It has been recognized that the death penalty is the most severe and awesome penalty known to our law and that the threat of the death penalty has been identified as a factor to be given considerable weight in determining whether a defendant has deliberately waived constitutional rights. *See Parker v. North Carolina,* 397 U.S. 790 at 809-10 (Brennan, J., dissenting).

In *Fay v. Noia* ,372 U.S. 391, 397, 439-40, Noia's attorney testified at the habeas corpus hearing that defendant Noia was motivated not to appeal his case by fear that if successful he might get the death penalty on a retrial. Had he appealed, he would have run

a substantial risk of electrocution and, as this Court said, "His was a grisly choice whether to sit content with life imprisonment or to travel the uncertain avenue of appeal which, if successful, might well have led to a retrial and death sentence."

In another case, *North Carolina v. Alford,* 400 U.S. 25 at 40, in the dissenting opinion by Mr. Justice Brennan it was said that "it is sufficient to state that Alford *was 'so gripped by fear of the death penalty'* that his decision to plead guilty was not voluntary but was the product of duress as much so as the choice reflecting physical constraint." (Emphasis added.)

It is submitted that state legislatures, as well as the Congress, can also conclude that the existence of the death penalty for certain heinous crimes might cause some potential murderers to be "so gripped by fear" that they would be deterred from criminal endeavors and would refrain from the firing of a gun at the lonely clerk standing in a liquor store or the police officer attempting to effect an arrest. As the Joint Report of the Legislative Committee on Capital Punishment of Pennsylvania said, "The plain fact is that it can never be known how many persons are actually deterred by threat of punishment whether capital or otherwise." It is also said that if capital punishment is so unique, so abhorrent and so fearsome it seems inconceivable that a rational person trying to decide whether to commit a capital crime would ignore the potential penalty of death.

See Wheeler, "Toward a Theory of Limited Punishment II: The Eighth Amendment After *Furman v. Georgia*", 25 Stan. L. Rev. 62 at 76.

It must be recognized that the innocent life saved when the potential murderer is "so gripped by fear" of the death penalty as to hold his fire and refrain from taking someone's life is not reflected in the statistics surveyed by the social scientists.

Petitioners, undeterred murderers, assure us that the death penalty does not deter. The fact that it does not deter *all* is no reason for rejecting this form of punishment (particularly by constitutional mandate). The statistics to which reference is made lump the undeterrable murders with those that could possibly be deterred. Studies of murder rates and their relationship to the death penalty would be valid only if they were limited to deterrable homicides involving a course of criminal conduct understandingly embarked upon, such as armed robbery, collection of insurance on the victim's life, kidnapping for ransom, etc.

At this point it may be well to refer to some information collected by those who have first-hand information concerning the deterrent effect of capital punishment, namely, those who deal with homicidal offenders.

Sheriff Peter Pitchess of Los Angeles County testified before the California Senate Committee on the Judiciary (1960) as follows:

> "But I can tell you that the overwhelming majority of people in law enforcement—the ones who are dealing with these criminals, the ones who are seeing them not as statistics but real live human beings, and who are studying their human behavior—are overwhelmingly convinced that capital punishment is a deterrent."

Likewise the late J. Edgar Hoover, Director of the Federal Bureau of Investigation, stated his unqualified opposition to the abolition of capital punishment in an issue of the Uniform Crime Reports for the United States (1959 issue):

> "The professional law enforcement officer is convinced from experience that the hardened criminal has been and is deterred from killing based on the prospect of the death penalty. . . . For the law enforcement officer the time-proven deterrents to crime are sure detection, swift apprehension, and proper punishment. Each is a necessary ingredient."[5]

See Bedau, "The Death Penalty in America," pp. 130-146.

There have been many surveys conducted to test the deterrent effect of the threat of the death penalty. One is the study by the Los Angeles Police Department on Capital Punishment concluded in February, 1971. This survey confirmed the validity of the conclusion drawn by innumerable legislatures that the threat of the death penalty is a deterrent to murder and the incidents documented in the surveys are from contacts with criminals which are real and direct rather than merely academic. We, of course, do not imply that all those whose experience with the criminal world is purely academic conclude otherwise. One example is Van Den Haag, "On Deterrence and the Death Penalty", 60 J. Crim. L.C. and P.S. 141 (June 1969).

---

[5]It may be noted that the Los Angeles Times (Nov. 16, 1966, Part I, p. 21) reported that "The Prison Officers Assn. of Great Britain has demanded the return of the death penalty, stating that since abolition of capital punishment . . . 'There is nothing to deter the growing number of long-term criminals from killing prison officers in an attempt to escape.' "

The Los Angeles Police Department survey, embodied in a 62-page report, was conducted between December 21, 1970, and February 4, 1971, and involved the interviewing of 316 arrestees. Unarmed suspects were asked why they did not arm themselves, and armed suspects who did not use their weapons were asked why they did not. Of the 316 persons interviewed, 217 denied their crime or refused a statement, primarily out of a desire not to jeopardize their case. The positive statements made by the remaining 99 are classified as follows:

1.	Deterred by fear of death penalty from carrying weapon or operative weapon	50	(50.5%)
2.	Unaffected by death penalty because it was no longer being enforced	7	(7.07%)
3.	Undeterred by death penalty, would kill whether it was enforced or not	10	(10.1%)
4.	Unaffected by death penalty because they would not carry weapon in any event, primarily out of fear of being injured themselves or of injuring someone else	32	(32.3%)

The conclusions drawn from the study are as follows:

> "I. The adoption of an effectively enforced death penalty system is a deterrent in the prevention of homicides.
>
> "II. Though the death penalty has not been removed from the statutes in California, many suspects believe in reality that no death penalty exists as it is not being enforced.

> "III. Some suspects, while realizing that the California death penalty exists in name only, disclose that the certainty of an executed death penalty would deter then from being armed while committing crimes."

The report also notes,

> "If this study contained only one and not the 50 documented cases supporting the fact that the death penalty is a deterrent, there should be no question of its retention and enforcement. In 1970 in the City of Los Angeles, 394 innocent people were victims of an unlawful execution without the right to due process of law."

See Hearings before Subcommittee of the Committee on the Judiciary, House of Representatives, Statement of Frank G. Carrington, pages 237-39.

An earlier survey by the Los Angeles Police Department is reported in *People v. Love*, 56 Cal.2d 720, 735-37 [336 P.2d 33, 41-42] (McComb, J. dissenting).

It would appear that what this Court has previously noted is ably supported by the foregoing, that is, that certain potential murderers are "so gripped by fear of the death penalty" that they refrain from taking life endangering action when in pursuit of their criminal enterprises, or, better yet, they do not engage in such enterprises at all.

Petitioners refer to these surveys and the statements of the law enforcement officers as "impressionistic accounts" or as "anecdotal impressions" of the law enforcement officers. It is clear that Congress and the

legislatures of the various states have not treated so cavalierly these surveys and the testimony of those who come into daily contact with the criminal. *See* Royal Commission of Capital Punishment Report, 1949-1953, page 21, sec. 61 (1953).

Likewise, in Appendix E of the Brief of Petitioner Fowler, incorporated in the petitioners' briefs herein, there is listed some of the conclusions regarding the utility of capital punishment, with particular reference to its deterrent effect. Amicus contends that the Constitution does not permit social scientists (Br. for Pet. Fowler, Appendix E, pp. 3e-6e), law enforcement officers (pp. 7e-9e), or the undeterred prison immate (pp. 9e-10e) who has committed murder to fashion the contours of the Eighth Amendment.

It is submitted that petitioners have failed to show that the death penalty serves no legitimate function in our society. The United States Constitution gives to the Congress and the legislatures of the various states, the elected representatives of the People, the right to determine that the protection of society under present conditions requires death as a form of punishment for certain serious crimes.

F. Contemporary Society Recognizes Capital Punishment as a Permissible Form of Punishment in Its Arsenal to Combat Crime

Petitioners assert that society has rejected capital punishment and that this "rejection" must be finalized by means of a constitutional interpretation by this Court.

However, petitioners are quick to admit that a significant number of jurisdictions have enacted death penalty legislation since *Furman* (Br. for Pet. Fowler, p. 131),

adding that the legislation is narrower in all but two cases, than their pre-*Furman* authorizations of capital punishment. The response of the majority of states to accomplish the restoration of capital punishment is documented in Petitioner Fowler's Brief, Appendix A.

It is difficult to accept petitioners' arguments on the purported rejection by society when the elected representatives of the People in a majority of the states have so quickly responded to assure their constituents the protection of this sanction.

Petitioners also seem to argue that society has rejected capital punishment because, it is asserted, prosecutors are not bound by rigid charging and plea acceptance rules, juries are not restricted in their findings on the facts, and governors and presidents are permitted to grant clemency; further, it is contended that this punishment is only meted out to "racial minorities and to the poor."

Petitioners offer no proof of the validity of their legal assertions or of the factual claims and they are hard pressed in the attempt to make the "rejection by society" arguments appear realistic. Yet this Court is asked to accept these speculative arguments and to make a constitutional judgment based thereon!

Petitioners imply that it is only vengeful and misguided people, out of step with the "evolving standards of decency that mark the progress of a maturing society," who are in favor of the death penalty today. It is submitted that there are innumerable indicia of the public's continued general acceptance of the death penalty as a necessary form of punishment consistent with contemporary religious and moral standards of decency and the dignity of man.

While amicus wishes to emphasize that the meaning of the cruel and unusual punishment clause cannot expand and contract with the ebb and flow of something as fickle as public opinion as reflected in polls and surveys, nevertheless, since those who seek the abolition have relied over the years on such indicators in support of their various contentions that the death penalty is out of favor with all but the police, prosecutors, and a few misguided others, amicus feels compelled to put this contention in the proper perspective.

Public sentiment has swung strongly in favor of the death penalty since this Court, citing a 1966 Gallup poll, characterized the United States as a nation less than half of whose people believed in the death penalty. *Witherspoon v. Illinois,* 391 U.S. 510, 520. It is submitted that the recent polls demonstrate that public opinion has swung in favor of capital punishment. This has been illustrated not only in the Gallup polls that have been taken but also in the elections relating to retention or abolition of the death penalty.

Of course, the most recent large-scale expression of public opinion, as far as California is concerned, occurred in 1972 when the death penalty initiative passed by an overwhelming majority, over 67% of the voters voting in favor of the initiative (5,386,904 votes to restore the death penalty) and to enable the state to be restored to the constitutional balance in which the legislative branch was to make the determination as to whether capital punishment should be retained or abolished.[6]

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[6]Just last March a poll conducted in California revealed that 74% of the persons polled were in favor of capital punishment. Los Angeles Times, p. 1, Part I, March 25, 1975.

A similar referendum was held on December 15, 1970, when the voters of the State of Illinois, in conjunction with a vote on whether to ratify the new constitution adopted by their constitutional convention, were asked to ballot as to whether the death penalty should be abolished in that jurisdiction. The referendum results were comparable to the results later obtained in California, and serve as a good indication of the national sentiment, in view of the fact that Illinois is another large state having a substantial metropolitan and rural population. The referendum resulted in 64.3% vote against the abolition of capital punishment.

Reference is made to the Solicitor's Brief in Fowler, Appendices A and B for the action by Congress providing capital punishment for various Federal crimes.

The popular sentiment in favor of the death penalty as a necessary form of punishment is reflected in the number of American jurisdictions that retained this penalty at the time that this Court spoke in *Furman v. Georgia, supra.* At that time, the District of Columbia, the federal government, and forty of the fifty states retained capital punishment as a form of punishment for certain crimes. At the time *Furman* was decided, despite almost five years of the "moratorium," there were over 600 prisoners committed to prisons on judgments of death. In this connection, it can avail petitioners nothing to claim that there have been no executions for almost nine years, as the moratorium was the result of the efforts of the prisoners' attorneys and not "rejection by society" of this penalty.

Note must be made of the reported "strategy" of those in the forefront of the effort to obtain a judicial veto of legislation providing for the death penalty.

This is set forth in Meltsner, "Cruel and Unusual, The Supreme Court and Capital Punishment", 1973, Random House, page 107. The successful strategy was to have a moratorium to create a death-row logjam, the longer death-row inmates waited the greater their numbers and the more difficult it would be for the courts to permit the first execution since a resumption would bring a cry of "blood bath," or so it was contended.

Presumptively, it would also allow the argument that the "lack" of executions indicated society's "rejection" of this punishment. It also could give rise to a claim that this use of the judicial process caused the anguish purportedly suffered by those who waited for long periods for execution.

Such transparent arguments could not cause favorable responses from legislators, and there is no reason to believe that it can avail the proponents of abolition in the courts.

It is submitted that the accurate barometer of the "evolving standards" was the constant number of defendants whom juries annually sent to the nation's prison systems under sentence of death. U.S. Bureau of Prisons, National Prisoner Statistics Bulletin: Capital Punishment 1930-1968 (August, 1968). It would appear that juries were continuing to perform their function in maintaining a link between contemporary community values and the penal system. *Witherspoon v. Illinois, supra,* at 519 n. 15.

The large majority of persons convinced of the need for capital punishment in America reflects a cross section of the nation's population. It is submitted that these persons, including retail clerks, grocery and

liquor store operators, pharmacists, bank tellers, gas station attendants and others who, like police officers, have frequent occasion to look down the "business end" of a robber's pistol or shotgun, do not share the petitioners' sentiment that the death penalty is a barbaric relic of the past. In short, contrary to the impression that petitioners seek to convey, there appears to be substantial support for the death penalty in almost all social, economic and occupational groups, and indeed, the preponderance of public opinion is in favor of retaining the death penalty as one of the forms of punishment available for serious offenses.

Petitioners apparently believe that this Court should respond to what they term the "world-wide" trend toward ending the use of the death penalty. It is submitted that this is a frail foundation upon which to postulate the unconstitutionality of the death penalty in this country. It is ridiculous to say that the Framers of the Eighth Amendment had in mind in 1789 that what nations did throughout the world should impair the ability of the various states to provide adequate punishment for those who violate the laws of the state. Certainly the availability of the death penalty for the protection of society was not to be judged by what occurred in countries such as Lichtenstein, Luxembourg, Surinam or Mozambique.

It has been stated that the total number of nations which are abolitionist represent a minority in the world community and it is to be noted that the conditions that lead any one of the foreign jurisdictions to conclude that a particular punishment is or is not required for the protection of its population varies from nation to nation as conditions vary from state to state within our own federal republic. It is further to be noted

that petitioners have not pointed to any democratic abolitionist nation which has rejected the death penalty by judicial declaration or edict!

Patrick, "The Status of Capital Punishment: A World Perspective" (December 1965), 56 Jour. Crim. L. COPS 397, 411; Royal Commission on Capital Punishment, 1949-1953 Report 340.

Amicus understands that in England, which retains capital punishment for certain crimes as do many "abolition" nations, the House of Commons recently rejected a bill to restore capital punishment for certain violent crimes (*See* Br. for Pet. Fowler, p. 115 n. 174). Amicus finds it reassuring that a nation, sharing a common heritage with the United States, still permits decisions as to the utility and availability of capital punishment to be determined by the elected representatives of the People!

Amicus submits that petitioners cannot sustain their claim that contemporary society rejects capital punishment. It is further evident that even if they could sustain this claim, they would state no case for the invalidation of the death penalty by means of a new interpretation of the Eighth or Fourteenth Amendments by this Honorable Court.

Conclusion

In an era characterized by rising crime rates, mass killings, inmate homicides, revolutionary bombings of public buildings, and the assassination of public figures and law enforcement officers, it would be inappropriate for a legislature to contravene the intent of the Framers and the will of the People by abolishing capital punishment. How much less appropriate would it be for

this Court, under the aegis of the Eighth or Fourteenth Amendments, to decree that this form of punishment, expressly sanctioned by the words of the Constitution and a long line of decisions by this Court, is now forbidden to the People by Constitutional mandate.

It is submitted that nothing has happened in the 187-year history of the Constitution which can alter the fact that the Framers contemplated the death penalty as a form of punishment of necessity available to the People and the states for the protection of society. Likewise, there has been no decision of this Court contravening the intent of the Framers, and contemporary society has accepted this sanction as a proper weapon to combat crime.

It may be appropriate, on the occasion of the celebration by the Nation of two centuries of existence, to recall the words of the first President counseling the young nation on the hazards that lay ahead and the wisdom of adhering to the separation of powers mandated by the Constitution:

> "It is important, likewise, that the habits of thinking in a free country should inspire caution in those entrusted with its administration, to confine themselves within their respective constitutional spheres; avoiding in the exercise of the powers of one department to encroach upon another.—The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism.—A just estimate of that love of power, and proneness to abuse it, which

predominates in the human heart, is sufficient to satisfy us of the truth of this position.—The necessity of reciprocal checks in the exercise of political power, by dividing and distributing it into different depositories, and constituting each the Guardian of the Public Weal against invasions by the others, has been evinced by experiments ancient and modern; some of them in our country and under our own eyes.—To preserve them must be as necesary as to institute them. If in the opinion of the People, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. —But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed.—The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield.—"[7]

Amicus urges this Honorable Court to reject the siren call of those who grow impatient with the democratic process and to refuse to declare unconstitutional legislation enacted following *Furman* by the elected representatives of the People in the states, and in Congress, providing, in appropriate cases, for the imposition of capital punishment for first degree murder and other serious crimes.

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[7]"The Washington Papers," Edited by Saul K. Padover; Harper & Bros. Publishers, N.Y. The Farewell Address, Sept. 19, 1796, p. 308.

Amicus respectfully submits that no case has been made by petitioners to justify the Court taking the unprecedented step of invalidating Congressional acts and state statutes providing for the death penalty on the ground that this punishment is now "cruel and unusual."

Respectfully submitted,

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APPENDIX A

[Death Penalty]

Sec. 27. All statutes of this state in effect on February 17, 1972, requiring, authorizing imposing, or relating to the death penalty are in full force and effect, subject to legislative amendment or repeal by statute, initiative, or referendum.

The death penalty provided for under those statutes shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments within the meaning of Article I, Section 6 nor shall such punishment for such offenses be deemed to contravene any other provision of this constitution. [New section adopted November 7, 1972. Initiative measure.]

APPENDIX B

California Penal Code Provisions Relating to Murder

Sec. 190. [Punishment for murder]

Every person guilty of murder in the first degree shall suffer death if any one or more of the special circumstances enumerated in Section 190.2 have been charged and found to be true in the manner provided in Section 190.1 Every person otherwise guilty of murder in the first degree shall suffer confinement in the state prison for life. Every person guilty of murder in the second degree is punishable by imprisonment in the state prison from five years to life.
Added Stats. 1973 ch 719 § 2.

Sec. 190.1. [Procedure in case involving death penalty]

In any case in which the death penalty is to be imposed as the penalty for an offense only upon the finding of the truth of the special circumstances enumerated in Section 190.2, the guilt or innocence of the person charged shall first be determined without a finding as to penalty. In any such case the person charged shall be represented by counsel. If such a person has been found guilty of such an offense, and has been found sane on any plea of not guilty by reason of insanity, and any one or more of the special circumstances enumerated in Section 190.2 have been charged, there shall be further proceedings on the issue of the special circumstances charged. In any such proceedings the person shall be represented by counsel. The determination of the truth of any or all of the special circumstances charged shall be made by the trier of fact on the evidence presented. In

case of a reasonable doubt whether a special circumstance is true, the defendant is entitled to a finding that it is not true. The trier of fact shall make a special finding that each special circumstance charged is either true or not true. Wherever a special circumstance requires proof of the commission or attempted commission of a crime, such crime shall be charged and proved pursuant to the general law applying to the trial and conviction of a crime. If the defendant was convicted by the court sitting without a jury, the trier of fact shall be a jury unless a jury is waived by the defendant with the consent of the defendant's counsel, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty the trier of fact shall be a jury unless a jury is waived by the defendant with the consent of his counsel. If the defendant was convicted by a jury, the trier of fact shall be the same jury unless, for good cause shown, the court discharges that jury, in which cases a new jury shall be drawn to determine the issue of whether or not any of the special circumstances charged are true or not true.

If the trier of fact finds, as to any person convicted of any offense under Section 190 requiring further proceedings that any one or more of the special circumstances enumerated in Section 190.2 as charged is true, the defendant shall suffer the penalty of death, and neither the finding that any of the remaining special circumstances charged is not true, nor if the trier of fact is a jury, the inability of the jury to agree on the issue of the truth or untruth of any of the remaining special circumstances charged, shall prohibit the imposition of such penalty.

In any case in which the defendant has been found guilty by a jury, and the same or another jury is unble to reach a unanimous verdict that one or more of the special circumstances charged are true, and does not reach a unanimous verdict that all of such special circumstances charged are not true, the court shall dismiss the jury and shall order a new jury impaneled to try the issues, but the issue of guilt shall not be retried by such jury, nor shall such jury retry the issue of the truth of any of the special circumstances which were found by a unanimous verdict of the previous jury to be untrue. If such a new jury is unable to reach a unanimous verdict that one or more of the special circumstances it is trying are true, the court shall dismiss the jury and impose the punishment of confinement in the state prison for life. Added Stats 1973 ch 719 § 4.

Sec. 190.2 [Mandatory death penalty upon special finding]

The penalty for a person found guilty of first-degree murder shall be death in any case in which the trier of fact pursuant to the further proceedings provided for in Section 190.1 makes a special finding that:

(a) The murder was intentional and was carried out pursuant to an agreement with the defendant. "An agreement," as used in this subdivision, means an agreement by the person who committed the murder to accept valuable consideration for the act of murder from any person other than the victim.

(b) The defendant personally committed the act which caused the death of the victim and any of the following additional circumstances exist:

(1) The victim is a peace officer, as defined in Section 830.1, subdivision (a) of Section 830.2, or subdivision (b) of Section 830.5, who, while engaged in the performance of his duty, was intentionally killed, and the defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties.

(2) The murder was willful, deliberate and premeditated and the victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding.

(3) The murder was willful, deliberate and premeditated and was committed during the commission or attempted commission of any of the following crimes:

(i) Robbery, in violation of Section 211.

(ii) Kidnapping, in violation of Section 207 or Section 209. Brief movements of a victim which are merely incidental to the commission of another offense and which do not substantially increase the victim's risk of harm over that necessarily inherent in the other offense do not constitute kidnapping within the meaning of this paragraph.

(iii) Rape by force or violence, in violation of subdivision (2) of Section 261; or by threat of great and immediate bodily harm, in violation of subdivision (3) of Section 261.

(iv) The performance of lewd or lascivious acts upon the person of a child under the age of 14, in violation of Section 288.

(v) Burglary, in violation of subdivision (1) of Section 460, of an inhabited dwelling house entered by the defendant with an intent to commit grand or petit larceny or rape.

(4) The defendant has in this or in any prior proceeding been convicted of more than one offense of murder of the first or second degree. For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California would be punishable as first or second degree murder shall be deemed to be murder of the first or second degree.

Added Stats 1973 ch 719 § 5.

Sec. 190.3. [Death penalty for person under eighteen prohibited]

(a) Notwithstanding any other provision of law, the death penalty shall not be imposed upon any person who was under the age of 18 years at the time of the commission of the crime. The burden of proof as to the age of such person shall be upon the defendant.

(b) Except when the trier of facts finds that a murder was committed pursuant to an agreement as defined in subdivision (a) of Section 190.2, or when a person is convicted of a violation of Section 37 or 128, the death penalty shall not be imposed upon any person who is a principal in the commission of a capital offense unless he was personally present during the commission of the act or acts causing death, and directly committed or physically aided in the commission of such act or acts. Added Stats 1973 ch 719 § 6.

Nos. 74-6257, 75-5394, 75-5491, 75-5706 and 75-5844

In the Supreme Court of the United States

OCTOBER TERM, 1975

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v.

STATE OF GEORGIA

JERRY LANE JUREK, PETITIONER

v.

STATE OF TEXAS

JAMES TYRONE WOODSON AND LUBY WAXTON, PETITIONERS

v.

STATE OF NORTH CAROLINA

CHARLES WILLIAM PROFFITT, PETITIONER

v.

STATE OF FLORIDA

STANISLAUS ROBERTS, PETITIONER

v.

STATE OF LOUISIANA

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF GEORGIA, THE COURT OF CRIMINAL APPEALS OF TEXAS, AND THE SUPREME COURTS OF NORTH CAROLINA, FLORIDA AND LOUISIANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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INDEX

	Page
Question presented	2
Interest of the United States	2
Summary of argument	5
Argument	16
I. The origins of the Eighth Amendment show that a legislature may constitutionally provide for capital punishment	16
A. The text of the Constitution demonstrates that the framers intended to allow capital punishment	16
B. For nearly two centuries the Eighth Amendment was understood to allow capital punishment	17
C. The English experience	19
D. The United States' derivation of the clause	22
E. Judicial construction	26
II. This Court should uphold a penalty enacted by a legislature, serving legitimate purposes, and accepted by contemporary society	31
A. Capital punishment serves legitimate purposes	34
1. Capital punishment deters crime	34
2. Capital punishment reinforces important social values	45

Argument—Continued — Page

a. Expression of moral outrage — 45

b. Death is not excessive in relation to all crimes — 48

3. Capital punishment incapacitates dangerous offenders — 50

B. Capital punishment is accepted by modern American society — 52

C. Differences of opinion concerning the propriety of the death penalty must be resolved in favor of the legislative judgment — 57

D. Several of the empirical observations by the Justices who concurred in *Furman* require reassessment in light of subsequent evidence — 61

III. Capital punishment is not imposed on the basis of race — 65

IV. Capital punishment may be imposed under the criminal justice system's present procedures. Each procedure is either required or permitted by the Constitution itself — 69

A. Discretion in the criminal justice system serves important social functions — 73

B. The discretion in the criminal justice system does not result in "freakish" imposition of capital punishment — 76

Argument—Continued — Page

C. Each of the particular sources of discretion in the criminal justice system is either permitted or compelled by the Constitution itself — 82

1. The charging decision — 83

2. Plea bargaining — 86

3. Jury nullification — 88

4. Lesser included offenses — 91

5. Jury discretion at the punishment phase — 93

6. Clemency — 100

D. All discretion taken together does not prevent the death sentence from being validly imposed — 101

Conclusion — 103

Appendix A — 1a

Appendix B — 9a

Appendix C — 17a

Appendix D — 24a

CITATIONS

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	Page
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	Page
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	Page
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Constitutions:

United States Constitution:	
Fifth Amendment	13, 16, 88, 102
Sixth Amendment	14, 88, 93, 102
Eighth Amendment	*passim*
Fourteenth Amendment	16
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English Bill of Rights of 1689	19, 22

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Statutes—Continued — Page

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-6257

TROY LEON GREGG, PETITIONER

v.

STATE OF GEORGIA

No. 75-5394

JERRY LANE JUREK, PETITIONER

v.

STATE OF TEXAS

No. 75-5491

JAMES TYRONE WOODSON and LUBY WAXTON, PETITIONERS

v.

STATE OF NORTH CAROLINA

No. 75-5706

CHARLES WILLIAM PROFFITT, PETITIONER

v.

STATE OF FLORIDA

No. 75-5844

STANISLAUS ROBERTS, PETITIONER

v.

STATE OF LOUISIANA

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF GEORGIA, THE COURT OF CRIMINAL APPEALS OF TEXAS, AND THE SUPREME COURTS OF NORTH CAROLINA, FLORIDA AND LOUISIANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation of January 22, 1976.

QUESTION PRESENTED

The United States will address the question whether the death penalty is always or inevitably cruel and unusual punishment within the meaning of the Eighth Amendment.

INTEREST OF THE UNITED STATES

Petitioners argue that the death penalty is unconstitutional because it is excessively cruel and because it is invariably applied arbitrarily. Acceptance of either argument will affect, if not decide, the validity

of any death penalty statute, whatever the crime and however the statute is framed.

The United States believes that imposition of the death penalty may sometimes be a necessary and appropriate measure to achieve the traditional goals of criminal justice. At the time this Court decided *Furman* v. *Georgia*, 408 U.S. 238, no fewer than 13 federal statutes provided for capital punishment, at the discretion of the jury, for certain crimes.[1] The validity of all of these statutes was called into question by *Furman*. Congress then enacted a statute providing the death penalty for aircraft piracy that results in death. 49 U.S.C. (Supp. IV) 1472 and 1473, 88 Stat. 410-413 (reprinted in Appendix C, *infra*). This statute places substantial constraints upon the discretion of the jury. The court must impose death if the jury finds that at least one of a specified

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[1] See 10 U.S.C. 856 (punishment upon conviction by court-martial); 18 U.S.C. 34 (destruction of aircraft or motor vehicle when death results); 18 U.S.C. 351 (assassination of a member of Congress); 18 U.S.C. 794 (espionage); 18 U.S.C. 1111 (murder within the special maritime and territorial jurisdiction of the United States); 18 U.S.C. (1970 ed.) 1201 (kidnapping that results in death); 18 U.S.C. 1716 (mailing prohibited articles when death results); 18 U.S.C. 1751 (assassination of the President); 18 U.S.C. 1992 (wrecking a train when death results); 18 U.S.C. 2031 (rape within the special maritime and territorial jurisdiction of the United States); 18 U.S.C. 2113(e) (bank robbery that leads to death or kidnapping); 18 U.S.C. 2381 (treason); 49 U.S.C. (1970 ed.) 1472 (aircraft piracy). We previously have argued that, because of the important differences between the civilian and the military justice systems, 10 U.S.C. 856 was not invalidated by *Furman*. See Brief for the respondent in *Schick* v. *Reed*, No. 73-5677, October Term, 1974.

group of aggravating factors exists and that none of a specified group of mitigating factors exists. Under any other circumstances the court must impose life imprisonment. The government bears the burden of proving the existence of an aggravating factor. This statute is similar to the Florida statute now before the Court.[2]

Congress has under consideration other bills that would authorize the death penalty in different circumstances. See, *e.g.*, S. 1, 94th Cong., 1st Sess. (1975), the proposed revision and recodification of the federal criminal code, which is pending in the Senate Judiciary Committee. Sections 2401 and 2402 of S. 1, which provide for capital punishment, are

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[2] The Florida statute allows a jury to "balance" certain listed aggravating and mitigating factors. It also allows the trial judge to discard the jury's findings. Because 49 U.S.C. (Supp. IV) 1473 provides that the presence of any mitigating factor precludes the imposition of a death sentence, outcomes are more certain than are those under the Florida statute. See also pages 93-99, *infra*. The Texas and Georgia statutes, although structuring and confining the exercise of the jury's discretion, are dissimilar to the federal statute and to each other. Texas law provides that the death penalty will be imposed (for authorized crimes) if and only if the defendant's acts deliberately created an excessive risk of death, the defendant is likely to commit additional crimes unless incapacitated, and the crime for which he was convicted was unprovoked. Georgia law provides that the death penalty will be imposed (for authorized crimes) only if the jury finds that at least one aggravating circumstance was present and only if the jury does not recommend mercy. For a typology of these and other post-*Furman* statutes see Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 Harv. L. Rev. 1690, 1699-1712 (1974).

supported by the President and are reprinted as Appendix D to this brief.

Although we do not specifically address the approach of the Antihijacking Act of 1974, S. 1, or any particular alternative approach, the United States has an important interest in this case because the Court's decision could affect the validity of every alternative approach and, if petitioners' arguments are accepted, render the death penalty *per se* unconstitutional.

SUMMARY OF ARGUMENT

The death penalty is a traditional sanction for those offenses society considers the most dangerous. Whether that penalty is necessary, or even appropriate, in a particular case is a judgment properly left to the representatives of the people and to the judges and juries who must decide whether to impose society's ultimate sanction. We submit that it is inappropriate for this Court to substitute its judgment about the propriety of the death penalty for that of the legislatures both more properly charged with the duty of making that judgment and more advantageously situated to collect and assess the relevant information.

We will not recount the positions taken by all nine members of this Court in *Furman* v. *Georgia*, 408 U.S. 238. Our argument is limited to those aspects of the capital punishment controversy that concern the propriety of this Court's exercise of power to nullify the considered judgments of the legislatures in 35 states, and of Congress, that capital punish-

ment is a legitimate response to certain crimes. We do not discuss the constitutionality or the propriety of any particular laws; instead we argue that neither the harshness of the penalty, nor the procedures necessarily used to administer it, render capital punishment unconstitutional *per se*. Judicially ascertainable changing standards of decency and the discretion built into our criminal justice system do not operate to make all death penalties cruel and unusual punishment.

I

The Constitution mentions capital punishment in four places, demonstrating that the framers intended to permit its use. At the time the Eighth Amendment was approved by the states capital punishment was a common sanction for serious crimes. The first Congress provided for use of the death penalty. If the meaning of that amendment were fixed by the practices in use at the time of its adoption, the outcome of this case would not be in doubt. But even if the cruel and unusual punishments clause must also be considered in light of the evolving standards of decency that mark a maturing society, the history of the amendment provides guidance to the understanding of how contemporary standards are to be evaluated, and how they are to be weighed against competing social goals.

The cruel and unusual punishments clause first appeared in the Bill of Rights of 1689, a reaction by Parliament to the excesses of the Stuart courts, and particularly to Lord Chief Justice Jeffreys, who

invented new combinations of punishments, not authorized by Parliament, and applied them in unusual fashions against the King's enemies. At the time the cruel and unusual punishments clause first appeared, drawing and quartering, and burning alive, were the usual methods of execution in England, and apparently were unaffected by the new clause. The clause appears to have been one chapter among many in the long struggle between King and Parliament to allocate the right to govern—cruel punishments were to be forbidden unless authorized by Parliament. The clause did not, however, restrict the power of Parliament to invent or prescribe punishments appropriate to an offense.

The clause was adopted in the United States with little debate, and we therefore cannot know whether the framers intended to adopt the clause with its English meaning. There is some evidence in the debates that it was directed against "barbarous" punishment that would amount to "torture." Others who originally had called for such a clause were concerned about the potentially unbridled punishing power of Congress. We can conclude from these debates that the American cruel and unusual punishments clause, unlike the English, binds legislators as well as judges. But nothing in the debates supports an inference that the framers thought that capital punishment, accepted as legitimate elsewhere in the Constitution, would be prohibited.

II

This Court's Eighth Amendment decisions have established the principle that the cruel and unusual punishments clause prohibits punishments that lie outside the bounds of tolerable social behavior. But all of the cases that have held punishments unconstitutional under the clause have dealt either with a strange form of punishment not used in American law (see, *e.g.*, *Weems* v. *United States*, 217 U.S. 349) or punishment applied to a "status" to which no penalty, however light, could attach (*Robinson* v. *California*, 370 U.S. 660). In each case involving the former category, it has been necessary to ascertain the limits established by the social consensus, and then to determine whether they have been transgressed. It also has been helpful to determine the reason why society had not rid itself of the apparently aberrant punishment without the need for judicial intervention.

When a penalty is enacted by a legislature and imposed only by a unanimous jury, the sanction is very unlikely to be outside the bounds of social tolerance. In our form of democracy the will of the people is expressed through their representatives. Since this Court's decision in *Furman* v. *Georgia* at least 35 states and the United States have enacted new statutes providing for the death penalty. We submit that it is utterly implausible that so many legislatures can, time and again, fail to reflect the will of the people concerning capital punishment. Were this Court to hold the death penalty unconstitutional, it would have to conclude that it—whose justices are not elected and have been given life tenure in order to insulate them from popular and political opinion—is more conscious of and more responsive to the will of the people than are the representatives directly elected by and responsible to those people. Petitioners seek a referendum among judges as a proxy for the "true" will of the people. But if the people are to give their verdict of what is cruel and unusual, the people—through their elected representatives and through juries—must sit in judgment.

To the extent the constitutionality of capital punishment depends not only on the limits of current social tolerance, but also on the nature of the purposes served by the sanction, we submit that capital punishment serves important and legitimate purposes. Because capital punishment is society's "ultimate" sanction, it is likely to have a stronger effect as a deterrent than do alternative sanctions. Two recent studies of the deterrent efficacy of the death penalty support this intuitive conclusion. Other studies of the death penalty are infected by serious analytical flaws, and so do not provide support for a contrary conclusion. But quite aside from empirical studies, the legislature is entitled to credit the logical argument that capital punishment deters crime because it is society's most severe sanction. This alone is sufficient to satisfy any constitutional requirement that the death penalty serve important social purposes.

Capital punishment of course has other purposes as well. The death penalty serves a vital function

as society's expression of moral outrage, and marks off some crimes as so repulsive that they are to be avoided by those individuals with even a trace of social responsibility. Some crimes, too, are so vicious, so offensive to society's standards of decency, that they call out for an ultimate sanction in order to reinforce the social feeling of revulsion to acts of that character. This response—retribution perhaps, although without vindictiveness—has been endorsed by respected commentators and seems an essential ingredient of a healthy society.

Finally, capital punishment incapacitates some individuals who, if allowed to remain alive, would be so immune to normal forms of social control that they would continue to commit murders even if sentenced to life imprisonment without possibility of parole. The federal prison system now confines at least one man who, since his incarceration for murder, has committed and been convicted of murders within prison on three separate occasions. This man, and others like him, will find opportunities to kill again, regardless of the care taken to guard them, and we submit that the Eighth Amendment does not compel society to grant them those opportunities.

Although there may be legitimate differences of opinion regarding capital punishment's propriety and utility in modern society, its value as a deterrent, and society's need for it to reinforce social values and incapacitate dangerous offenders, those differences of opinion are to be resolved by the legislature. The legislative judgment on these matters should be ac-

cepted by the judicial arm. Once the Court has satisfied itself that there is support for the legislature's decision, its role has been exhausted. An omniscient observer might conclude that all legislatures were mistaken in believing that capital punishment is ever appropriate, but the data such an observer would use, and the standards he would apply when weighing the moral values implicated in the death penalty, are beyond the ken of courts and perhaps beyond the ken of mankind. The judgment of a legislature that capital punishment is necessary and appropriate is based on its evaluation of unsettled empirical and moral questions, and its resolution of those questions should not be cast aside.

Several of the Justices who concurred in *Furman* advanced empirical arguments that led them to a different conclusion. But the validity of these arguments is now open to question. The response of state legislatures, and of Congress, to *Furman* has demonstrated that the legislative will is frustrated unless the death penalty is imposed upon some individuals. The same legislative response has established that capital punishment is "necessary" in our society to achieve articulable and rational goals. And some legislatures have been willing to impose capital punishment with considerable frequency.

III

Beyond these considerations, it is important to note that no pattern of racial discrimination in the imposition of the death penalty for murder has been shown, and apparently none can be shown. Although

blacks are sentenced to death at an apparently high rate, they also commit a disproportionate share of the capital crimes. Nearly 60 percent of those arrested for willful homicide are black, a proportion very close to the ratio of blacks to whites among those sentenced to death. Much of the argument here asks the Court simply to assume the existence of racial discrimination. But no such assumption is justified by the available data, and the most recent study indicates the absence of discrimination.

IV

We agree with petitioners that the process by which the criminal justice system operates, involving charging discretion, plea bargaining, the jury's ability to acquit, and executive clemency, involves discretion that will be with us so long as we have a system of criminal *justice*. But the inevitable presence of such discretion cannot render the death penalty unconstitutional—indeed, it is an odd argument to make, because it requires the Court to conclude, although the Eighth Amendment does not of its own force bar death as a form of punishment, that the death penalty can never be imposed under the criminal justice system established by our Constitution. To the extent it is a challenge against discretion in the criminal justice system, the argument assails that discretion as applied to all crimes, whether or not a death penalty results. Every argument petitioners make is equally applicable to life imprisonment.

Petitioners' argument also is odd because it is cast in Eighth Amendment rather than in Fifth Amendment terms. We would suppose that if a court were concerned with the procedures by which capital punishment is imposed, the appropriate avenue of inquiry would be the Fifth Amendment's command that no person may be "deprived of life * * * without due process of law." That, of course, was the argument in *McGautha* v. *California*, 402 U.S. 183, with respect to jury discretion, and the Court rejected it. The argument should be cast in that form here as well. Some of petitioners' contentions—such as the claim that laws providing for capital punishment often are too vague to enable the jury to decide when such a crime has been committed, or that plea bargaining offers opportunities for discrimination—are particularly appropriate candidates for such narrow presentation. The vagueness doctrine is well defined, and excessively vague statutes may be set aside without calling into question the ability of the legislature to provide for capital punishment. Similarly, racial or other invidious discrimination occurring in plea bargaining, or at other stages of the criminal justice system, is unconstitutional and may be challenged directly. But this is not an argument against the imposition of the death penalty by a criminal justice system that does not so discriminate. No one would argue that because juries might unlawfully discriminate, juries should be abolished. Similarly, if, as we argue, the death penalty is not a forbidden type of punishment, it cannot be abolished

on the basis that some individuals might seek to impose it for invalid reasons. The same can be said for any punishment.

As for the remaining avenues of discretion, each is either required or encouraged by the Constitution itself. The prosecutor's unfettered discretion to decline to prosecute is largely a product of the separation of powers in our constitutional system. It is a discretion necessary to enable the prosecutor to fulfill his duty under the Due Process Clause not to prosecute an individual unless there is a reasonable prospect of conviction.

Plea bargaining has been approved by this Court, which has stated that it is to be "encouraged." *Santobello* v. *New York*, 404 U.S. 257, 260. Moreover, plea bargaining, like the other sources of discretion assailed by petitioners, operates in favor of an accused, and (unlike some other sources of discretion) only at his behest. An individual need not engage in such bargaining unless he believes it will be advantageous.

The power of a jury to acquit despite evidence justifying conviction derives from and is protected by the Sixth Amendment right to trial by jury, and the same provision creates the jury's right to convict of lesser included offenses (again at the behest of the accused) if it finds facts that make such a conviction appropriate.

The power of the judge and jury, acting under statutory guidelines, to select between sentences of death or life imprisonment involves far less discre-

tion than the standardless discretion upheld against constitutional challenge in *McGautha*, *supra*. In any event, most of petitioners' challenge to this discretion is in reality an argument that the statutory criteria are unconstitutionally vague. That argument has nothing to do with the constitutionality of capital punishment, for vague statutes can be construed or appropriately amended.

Finally, the power of the executive to grant clemency is established by the Constitution, and as this Court recently held (*Schick* v. *Reed*, 419 U.S. 256) it is an unfettered power because the essence of mercy is discretion.

In the last analysis, petitioners seek to convince this Court that procedures required or encouraged by one part of the Constitution inevitably produce a result forbidden by the Eighth Amendment. But the Eighth Amendment requires no such result, and, to the extent there is any leeway in construction, the Amendment should be read in a manner that makes it harmonious with, rather than antagonistic to, the remainder of the Constitution. The Court should not rule that although the process and procedures used imposing the death penalty are constitutionally permissible, indeed in many instances compelled, the death penalty is nevertheless unconstitutional under the Eighth Amendment *because* of those very processes and procedures. Yet that, we submit, is the essence of petitioners' argument in this regard.

ARGUMENT[1]

I. THE ORIGINS OF THE EIGHTH AMENDMENT SHOW THAT A LEGISLATURE MAY CONSTITUTIONALLY PROVIDE FOR CAPITAL PUNISHMENT

A. The Text Of The Constitution Demonstrates That The Framers Intended To Allow Capital Punishment

The Fifth Amendment, adopted at the same time as the Eighth, shows that the framers of the Constitution contemplated the continued use of capital punishment. That sanction is addressed three times in the Fifth Amendment's requirement of a presentment or indictment by a grand jury in capital cases, its prohibition of double jeopardy of life, and its requirement that there be due process of law in deprivation of life. It is, of course, impossible that the framers intended the Eighth Amendment to ban a punishment while simultaneously specifying the procedural safeguards for the infliction of that punishment. The Fourteenth Amendment, adopted just over three quarters of a century later, also contemplates the validity of the capital sanction, providing that no state shall deprive any person of "life, liberty, or property" without due process of law.[4]

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[1] This brief augments the arguments we made in our brief *amicus curiae* in *Fowler* v. *North Carolina*, No. 73-7031. Further reference to our *Fowler* brief consequently is unnecessary.

[4] Indeed, the cruel and unusual punishments clause of the Eighth Amendment applies to the states only through the due process clause of the Fourteenth Amendment. It would be anomalous if the clause specifying the means by which a state can deprive a person of "life" should now be held to forbid such a deprivation entirely. Cf. *Richardson* v. *Ramirez*, 418 U.S. 24.

The clear lesson of the text concerning the framers' intention is supported by history. At the time the Eighth Amendment was ratified by the states, capital punishment was a common sanction in every state for serious crimes. There is nothing in the debates accompanying its adoption to indicate any anticipation that the Eighth Amendment would, either immediately or in the future, prohibit the imposition of capital punishment. Indeed, the First Congress of the United States enacted legislation providing death as the penalty for a variety of offenses. 1 Stat. 112.

B. For Nearly Two Centuries The Eighth Amendment Was Understood To Allow Capital Punishment

For nearly two centuries this nation justifiably assumed that the death penalty was a permissible sanction, to be imposed according to statute—a sanction legislatures could choose as the necessary and appropriate response to certain criminal activity. This consensus was so complete that the constitutionality of the death penalty never directly came before this Court. Because no Justice believed that the penalty itself was improper, it was unnecessary even to discuss the proposition. Cases turned simply on the manner of its imposition. See *Wilkerson* v. *Utah*, 99 U.S. 130 (death by public shooting not cruel and unusual); *In re Kemmler*, 136 U.S. 436 (death by

electrocution not cruel and unusual); *Louisiana ex rel. Francis* v. *Resweber*, 329 U.S. 459 (death by repeated electrocutions not cruel and unusual); *Trop* v. *Dulles*, 356 U.S. 86, 99 (dictum). Cf. *Weems* v. *United States*, 217 U.S. 349, 382, 409 (White, J., joined by Holmes, J., dissenting); *McGautha* v. *California*, 402 U.S. 183, 226 (opinion of Black, J.). See also *Storti* v. *Commonwealth*, 178 Mass. 549 (Holmes, C.J.).

If the meaning of the Eighth Amendment were fixed by the intentions and practices of its framers, the outcome of this case would not be in question. However, this Court has concluded that the legality of a penalty under the Eighth Amendment must also be considered in light of the changing standards of decency that mark an evolving society. *Weems* v. *United States*, *supra*; *Trop* v. *Dulles*, *supra* (plurality opinion). If the cruelty and the unusualness of a penalty is to depend in part on the changing standards of decency in society, so that the amendment is, to that degree, a barometer of contemporary "social conscience" as well as a reflection of historical traditions, it is necessary to know how contemporary standards are to be evaluated, and once evaluated, how this data is to be weighed. Nevertheless, one thing is certain: the historical background of the Eighth Amendment must be consulted in order to determine the meaning of "cruel and unusual punishments." History may not completely fix the meaning of the Constitution, but it sets limits, and the words used by the framers acquire scope and function from the events they summarize. See generally *United States* v. *Watson*, No. 74-538, decided January 26, 1976; *Ex parte Grossman*, 267 U.S. 87, 108-109; *United States* v. *Wong Kim Ark*, 169 U.S. 649, 655-656.

C. The English Experience

Until the late 1600's England had developed no general prohibition against cruel, barbarous or illegal punishments. The Magna Carta forbade excessive punishments, but "excessive" meant death for a trifling offense. Holt, *Magna Carta* 323 (1965); cf. Barrington, *The Magna Charta and other Great Charters of England* 181, 199 (1900). The criminal law was severe and unyielding; even though some charters reserved great punishments for "great" crimes, most thefts were felonies, and felonies were capital offenses. 1 Stephen, *History of the Criminal Law in England* 457-492 (1883). The slogan, often accepted even in the seventeenth century, that "the punishment should fit the crime" (see Perry, *Sources of Our Liberties* 236 (1959)) simply meant that, however much greater the punishment than the harm inflicted by the crime, some measure of proportionality was necessary, and a comparison to other authorized punishments appropriate.

The phrase "cruel and unusual punishments" was first used in the Bill of Rights of 1689, drawn up by Parliament as part of the accession of William and Mary. Perry, *supra*, at 247. Most historians have attributed this clause to Parliamentary reaction

to the "Bloody Assize" of 1685, a series of treason trials held after the abortive uprising by the Duke of Monmouth. See generally Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 Calif. L. Rev. 839, 852-860 (1969) (which questions this attribution).

Monmouth's rebellion was an attempt to overthrow King James II. Monmouth was defeated and the king appointed Chief Justice Jeffreys of the King's Bench to a special assize to try the captured rebels. Because of the number of treasonous prisoners a series of trials would have been lengthy and complicated; Jeffreys undertook to simplify his task by engaging in plea bargaining. Those who pleaded guilty were promised that their lives would be spared; many did so, but James II and Jeffreys reneged on the bargain and executed many of the prisoners the next winter. After James II had fled, Parliament reacted to the Bloody Assize of the previous year with proposals to secure the people against the "illegal and cruel" punishments inflicted by such special (and unauthorized) tribunals. See Somers, *A Vindication of the Late Parliament of England* 3 (1690).[5]

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[5] The methods of punishment used by the Bloody Assize were not "cruel" within the English experience. The rebels were hanged, cut down and disemboweled while alive, drawn and quartered. Females were burned while alive. But the punishments were imposed by a royal tribunal, free of Parlimentary control or authorization. To that extent they were unauthorized. And, of course, because many of the executions were in violation of the original pleas and judgments, they were "illegal."

Granucci, on the other hand, attributes the cruel and unusual punishments clause of 1689 to the history of Titus Oates and the "Popish Plot" of 1678-1679. Granucci, *supra*, at 856-860. The "Popish Plot" was a ruse by Oates to convince his countrymen that Catholic agents would assassinate Charles II and place the Catholic James II on the throne. Oates swore to the fictitious "plot" and in the ensuing commotion 15 Catholics were tried and executed.

Oates' perjury was exposed after the succession of James II, and Oates himself was tried and convicted by the King's Bench, Chief Justice Jeffreys presiding, and sentenced to a fine, life imprisonment, whippings, defrocking, and to pillorying four times yearly. The House of Lords upheld the judgment, but the Commons intervened on behalf of Oates, on the basis that this punishment was inhumane and illegal because not authorized by Parliament. The objection again was that the combination of pains and penalties had never been authorized as a response to the crime of perjury, and that the court was without jurisdiction to impose it, even though life imprisonment, whippings and pilloryings were common sanctions both singly and in combination, and could not, in the seventeenth century, have been thought "excessive" for a crime that had sent 15 innocent people to their deaths.

The English history of the prohibition of cruel and unusual punishments, therefore, supports at most a prohibition against punishments unauthorized for the

crime, and against egregiously disproportionate punishments for nonfelony offenses. The prohibition did not restrict the punishing power, nor did it limit punishments to those minimally "necessary" in light of the crime. Parliament was attempting to bridle the King's courts;[6] there is no hint that Parliament was attempting to inhibit its own judgments or was authorizing the courts to do so.[7] The Bill of Rights of 1689 did not secure the liberties of the people. It was simply another tool in the extended struggle between Parliament and King to allocate the power to govern.

D. The United States' Derivation of the Clause

The debates at the time of the adoption of the Eighth Amendment reveal little about the framers' understanding of its origins or meaning. The Senate debates on the amendments were closed entirely (Goebel, *History of The Supreme Court of the United States, Vol. I: Antecedents and Beginnings to 1801*

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[6] The preamble to the Bill of Rights of 1689 stated that James II and his courts were arbitrarily "assuming and exercising the power of dispensing with and suspending of laws and the execution of laws, without consent of parliament." The King had claimed such power. See Kenyon, *The Stuart Constitution 1603-1688*, 420-426 (1966).

[7] Cf. *Martin* v. *United States*, 317 F.2d 753, 755 (C.A. 9): "[I]t is well settled that a sentence that falls within the terms of a valid statute cannot amount to a cruel and unusual punishment * * *." Even in 1769 Blackstone believed that cruel and excessive punishments were controlled only by the "tacit consent" of the people, 4 Blackstone, *Commentaries on the Laws of England* 369-373 (1769), and that the Bill of Rights of 1689 did not constrain Parliament.

444 (1971)) and little was said about the clause in the recorded debates.

The materials available from colonial times are not sufficiently comprehensive to enable historians to ascertain the source of most of the amendments that comprise the bill of rights. Professor Goebel has speculated that the proposed amendments were compiled in a grab-bag fashion from lists of rights that were known to the colonies from treatises on English law and had, in one fashion or another, become part of the law of one or more of the colonies. See also Levy, *The Origins of the Fifth Amendment* 411 (1968). The cruel and unusual punishments clause of the Eighth Amendment was taken verbatim from the English Bill of Rights of 1689, although several of the colonial constitutions had similar provisions.

Its insertion may well have been prompted by complaints in the state ratifying conventions that the Constitution contained no limits on the methods of federal punishment. For example, in the Massachusetts convention of January 1788, an objection was made that

> [Congress will] have to ascertain * * * and determine, what kinds of punishments shall be inflicted on persons convicted of crimes. They are nowhere restrained from inventing the most cruel and unheard-of punishments and annexing them to crimes; and there is no constitutional check of them, but that *racks* and *gibbets* may be amongst the most mild instruments of their discipline. [2 Elliot, *The Debates in the Several*

State Conventions on the Adoption of the Federal Constitution 111 (2d ed. 1836).]

See also *Furman, supra,* 408 U.S. at 320-321 (Marshall, J., concurring). In the Virginia debates Patrick Henry objected to the possibility of uncontrolled use of "tortures" and "barbarous" punishments, and George Mason explained that such punishments were prohibited in Virginia by the Virginia constitution's cruel and unusual punishments clause, which would forbid all "torture." 3 Elliott, *supra,* at 447, 452.

These expressions may indicate that the framers desired a clause that would bind legislators as well as judges; there is no contrary indication in the sparse debates in the House of Representatives. But the emphasis by those who objected to a lack of a cruel and unusual punishments clause was the need for a prohibition of "torture" or other barbarous forms of punishment, thus showing that legislatures were to continue to have considerable leeway in determining the scale of punishments to be used.

During the debates on the floor of the House only two representatives spoke to the cruel and unusual punishments clause. Mr. Smith of South Carolina believed that the clause was too "indefinite" and Mr. Livermore thought it unnecessary. Mr. Livermore went on to argue that some punishments (such as hanging, whipping and cutting off of ears) were "cruel" but necessary. 1 Annals of Congress 753-754 (1789).

It is difficult to interpret the vote in favor of the clause immediately after this objection. Because

hanging was an accepted penalty for crime at the time, and because the first Congress itself provided for capital punishment, it can be inferred that these early congressmen thought Livermore's interpretation of the clause not well taken; even though a punishment might be "cruel" in a general sense, it was not necessarily "cruel" in the constitutional sense and so not inevitably to be prohibited by the clause. In affixing individual responsibility, Congress would be permitted to use its judgment, weighing the inevitable cruelty of *any* punishment against the social need for it.

The amendment fell into desuetude after its adoption; cases rarely discussed it, and no penalty was held forbidden under it until *Weems* was decided in 1909. This was probably the proper fate for the amendment in light of its history, for the history discloses, to the extent it discloses anything, that the amendment was an attempt to guarantee against the new national government, concerning which many persons were apprehensive, a then-prevalent social consensus that some punishments were simply beyond the pale of civility. The apprehensions were not well-founded, and the guarantee, given our form of government, was largely (though, as we will show, not completely) unnecessary. Any such punishment would almost invariably be extinguished by the legislature before it could be tested in the courts. Were a punishment intolerable, it would be rejected by the people themselves—and that rejection would come not only by legislative repeal or alteration but also by the

refusal of juries to convict of crimes carrying the intolerable punishment. In this light, the amendment states a standard below which communities and their legislatures may not fall; it provides a safeguard against the aberrational case, in which the punishment imposed is profoundly and demonstrably contrary to prevailing standards of decency.

E. Judicial Construction

If the Eighth Amendment enforces the evolving standards of decency that mark a civilized society, the first task is to ascertain whether there is a particular social consensus concerning the practical and ethical values that pertain to punishment, and whether a particular punishment transgresses the limits established by that consensus. This Court's Eighth Amendment decisions have attempted to undertake such an inquiry, and have facilitated that investigation with an additional inquiry into the reasons why society failed to prevent the "intolerable" punishment without judicial intervention. If such a reason explaining the apparently deviant assessment of punishment is present there will be additional support for the judicial inference that those who have imposed the punishment—rather than those who sit in ultimate judgment—have misapprehended the social standards of decency.

In *Weems* v. *United States*, *supra*, this Court dealt with *cadena temporal*, a Philippine traditional punishment (for even petty offenses) that imposed 15 years' "hard and painful labor," the constant wear-

ing of chains, loss of all civil rights, and perpetual surveillance. The punishment failed the "consensus" test because it was not native to this country and never had been an accepted punishment for crimes here. The penalty, by all American standards, was patently harsh and disproportionate to the offense. Nor was it difficult to see why the consensus had failed to make itself felt without judicial intervention: the penalty had been invented by a foreign legislature and was imposed by a foreign judicial system unaccustomed to our sensibilities.

In *Trop* v. *Dulles*, *supra*, a plurality of this Court concluded that denationalization was cruel and unusual punishment. The power to denationalize a deserting soldier had been placed in the hands of military officials, and they had used it to strip citizenship from Trop, who had "deserted" for a single day and voluntarily surrendered. There, too, the consensus had failed. Denationalization was not a traditional American punishment for crime; it was (of course) not used by any state. The plurality concluded that citizenship is not subject to the general powers of Congress; Congress therefore could not authorize this admittedly unusual punishment whether or not it was appropriate—an issue the plurality thought irrelevant. Mr. Justice Brennan, concurring (356 U.S. at 105), agreed. Moreover, the Court highlighted the mechanism through which the social consensus had been avoided: the decision to denationalize had been removed from a jury, which could refuse to impose socially unacceptable punish-

ments, and had been placed in the hands of military authorities (a general court-martial convicts by less than unanimous vote and therefore is, for example, less likely to reject unacceptable punishments, and courts-martial are not designed to produce a cross-section of the civilian community). See the opinion of Mr. Justice Black, concurring, 356 U.S. at 104-105.

The use of the Eighth Amendment in *Robinson* v. *California*, 370 U.S. 660, varies somewhat from this pattern but is not inconsistent with it. In *Robinson* the Court did not hold that some particular penalty was cruel and unusual, but that *any* penalty for narcotic addiction would be cruel and unusual because a status, as distinguished from an act, could not be a crime. That is a decision different in kind from the decision to be made in these cases. *Robinson* decided that some things could not be made crimes, not that the legislature was forbidden to apply a particular penalty to a particular crime.

In other cases in which this Court has upheld specific penalties it has decided that the penalty itself did not overstep the tolerance of the social conscience. For example, in *Howard* v. *Fleming*, 191 U.S. 126, the Court rejected a claim that ten years' incarceration for conspiracy to defraud was cruel and unusual; the Court concluded that such a course had not been rejected by the people as barbarous or depraved, was accepted by many legislatures, and was not egregiously disproportional to the provocation. See also *Badders* v. *United States*, 240 U.S.

391; *United States ex rel. Milwaukee Social Democratic Publishing Co.* v. *Burleson*, 255 U.S. 407.

The lower courts have, in the main, followed a similar course. They have approved legislatively prescribed penalties unless there was evidence that other jurisdictions rejected those penalties and, in addition, the penalties appeared to be so excessive that they are repulsive and unnecessary. See, *e.g.*, *United States* v. *Beverely*, 416 F.2d 263 (C.A. 9) (upholding the 25-year minimum sentence for aggravated mail robbery).[8]

Considerably less deference has been shown to punishments decreed or augmented by administrative officials; in such cases there are greater opportunities for individuals to impose punishments for which the representatives of the people would not vote and which society would not tolerate were the punishments known. The smaller the decision-making body, the more likely it is to err in its reading of the demands of the social mores and the less likely the penalty will be brought to public attention for correction. Moreover, to the extent punishment is imposed or augmented by administrative officials with-

[8] Following the same analysis, but reaching a different result, is *Hart* v. *Coiner*, 483 F.2d 136 (C.A. 4), certiorari denied, 415 U.S. 983, which holds that life imprisonment for petty recidivism is cruel and unusual because it has been rejected by almost all states. See also *Downey* v. *Perini*, 518 F.2d 1288 (C.A. 6), vacated and remanded for reconsideration, December 2, 1975, No. 75-219, which holds that 60 years' imprisonment for possession and sale of marijuana is cruel and unusual on a similar theory. Cf. Note, 44 Fordham L. Rev. 637 (1975) (collecting cases).

out specific sanction from the legislature, the responsibility for punishment has been removed from a body ultimately responsible to the people. There has, therefore, been a greater willingness to examine the potentially barbaric conditions created by isolated prison officials (see, *e.g.*, *Holt* v. *Sarver*, 442 F.2d 304 (C.A. 8); *Finney* v. *Arkansas Board of Correction*, 505 F.2d 194 (C.A. 8)) or even by individuals within a prison system who act to deprive an inmate of medical care or protection from other aggressive inmates (see, *e.g.*, *Newman* v. *Alabama*, 503 F.2d 1320, 1330-1332 (C.A. 5)).

Because even at its broadest interpretation the cruel and unusual punishments clause protects against only those punishments utterly outside the bounds of social tolerance, it is not surprising that great deference should be shown to penalties selected by a legislature and enforced by the unanimous decision of a jury. In a representative democracy the legislature speaks for the people that elected it. Once enacted, the penalty cannot be imposed unless the people themselves, acting as a jury of the peers of the accused, agree to its imposition. And the jury, with its prerogative to "nullify" laws and penalties repellent to its sensibilities, is an effective ultimate check against legislative aberrations.

Thus, if a penalty can pass the dual test of enactment by the people's representatives, and application by the people themselves sitting as a jury, it is almost certainly not so cruel, disproportionate, or repulsive to the sensibilities of modern society that it

is forbidden by the cruel and unusual punishments clause. Those who would paint it so must make their case by clear and convincing evidence. They cannot call on this Court to sit as a "super-legislature" (*Burns Baking Co.* v. *Bryan*, 264 U.S. 504, 534 (Brandeis and Holmes, JJ., dissenting)) and assess merely whether the legislature's decision was wise.[9]

II. THIS COURT SHOULD UPHOLD A PENALTY ENACTED BY A LEGISLATURE, SERVING LEGITIMATE PURPOSES, AND ACCEPTED BY CONTEMPORARY SOCIETY

If our analysis of the cruel and unusual punishments clause is correct, that clause forbids only penalties similar in nature to those the framers wished to forbid (a category certainly not involved here) or penalties that fall so far beyond the pale of social acceptability that they appear as aberrations. The clause is appropriately directed to such aberrations, in which, through a combination of circumstances (whether uninformed, accidental or malign), a punishment utterly unacceptable to society has been decreed or imposed. A solitary individual, whether he be legislator, prison administrator, judge or juror, could assess a penalty or create conditions offensive to contemporary standards of decency. But it is difficult to see how such a mistake, such a gross misunderstanding, can be made time and again by legislatures of the several states and the Congress,

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[9] See also *Ferguson* v. *Skrupa*, 372 U.S. 726, 731.

and by the juries that assess guilt with the knowledge of the potential penalties. There are too many participants in the process, too many individuals (including, as well, the prosecutor, grand jury, and governor or other clemency authority) *each* of whom would have to be ignorant of or flaunt society's demands, for it to be true that a legislatively enacted and judicially enforced penalty could constitute cruel and unusual punishment.

We do not claim that even this process can never err. It is conceivable that aberrant laws can be passed and aberrant juries found. But the challenge raised by petitioners is not a challenge to unusual or freakish events; most states provide for capital punishment, and in 1974 alone 151 individuals were sentenced to death. At the end of 1974 at least 254 individuals had been sentenced to death since *Furman* and were awaiting execution.[10]

How then can it be declared by this Court, by any court, that the death penalty contravenes evolving standards of decency or contemporary notions of human dignity or society's currently-held moral values? The framers of the Constitution "might have made the judge the mouthpiece of the common will, finding it out by his contacts with people generally; but he would then have been ruler, like the Judges of

[10] Law Enforcement Assistance Administration, *Capital Punishment 1974*, p. 1 and Table 7, p. 26 (1975). As petitioner Jurek concedes, this is a "not inconsiderable" number. *Jurek* Br. 67-69, n.108. Cf. *id.* at 83-84, n.147 (discussing data collected by the NAACP, which shows 454 death sentences through February 25, 1976).

Israel." [11] The question cannot be avoided: if this Court were to hold that the death penalty violates evolving standards of decency, would not one then be required to conclude that 35 state legislatures and the Congress of the United States are unenlightened, that they are out of step with contemporary moral standards and the will and spirit of the people who elected them? Courts announce their view of society's standards of decency and, by doing so, encourage public acceptance of what can at best be only a prediction. But with respect to the death penalty the Court has previously spoken,[12] and it has seen the response.

This is not to say that a position espoused by an enlightened few is to be ignored. It is not. In all societies, in all ages, the ideas of those in a minority have influenced and inspired those in the majority. But this describes the legislative process, not the judicial. Only when a minority opinion has gradually made its way to acceptance by the society can we be sure that it was and is the enlightened view and not merely an unpopular and unpersuasive opinion. If judges anticipate the moral verdict of society, they will frequently anticipate incorrectly and fasten their own views upon the nation in the name of enlightenment. Such a theory of judicial power resembles too closely Rousseau's concept of the general will, which

[11] Learned Hand, "How Far is a Judge Free in Rendering a Decision?" (1935), in *The Spirit of Liberty* 109 (Dilliard ed. 1960).

[12] *Furman* v. *Georgia*, *supra*.

is entitled to govern even when possessed only by a minority, and is antithetical to the tenets of representative democracies. If, as the Eighth Amendment contemplates, the people are to give their verdict of what is cruel and unusual, the people—through their elected representatives—must sit in judgment.

A. Capital Punishment Serves Legitimate Purposes

In enacting death penalty statutes, the legislatures throughout the country have not acted irrationally. Capital punishment serves several important social purposes, among which are deterring crimes and expressing society's moral outrage in a manner that shapes and reinforces the community's standards.

1. *Capital Punishment Deters Crime.*

There is an inherent logic to the belief that the death penalty deters at least some people from committing crimes. "Belief in the deterrent efficacy of penal sanctions is as old as the criminal law itself." Zimring & Hawkins, *Deterrence* 1 (1973). Just as some penalty deters a prospective offender by making the prospect of crime less attractive, so does a more severe penalty make crime still less attractive, and so less likely to occur.[13] Because death is per-

[13] There is strong empirical evidence that the threat of imprisonment deters crime (including murder) and that longer sentences are a more effective deterrent. See Ehrlich, *Participation in Illegitimate Activities: A Theoretical and Empirical Investigation,* 81 J. Pol. Econ. 521 (1973); Block and Lind, *An Economic Analysis of Crimes Punishable by Imprisonment,* 4 J. Legal Studies 479 (1975); Ehrlich, *The Deterrent*

ceived by most potential law breakers as the maximum feasible penalty, it is probably the most effective deterrent force. "*Prima facie* the penalty of death is likely to have a stronger effect as a deterrent to normal human beings than any other form a punishment * * *." Royal Commission on Capital Punishment, *1949-1953 Report*, ¶ 61 (1953). It is not unreasonable or insupportable for a legislature to credit an argument with such strong plausibility.

The primary arguments against the deterrent force of capital punishment are that criminals (by definition) are not "normal" people, and so do not respond in "normal" ways, and that many murders or other capital crimes are crimes of passion and hence not deterrable. Neither argument supports a conclusion that capital punishment does not have a deterrent effect. The only surface evidence that criminals are not "normal" is their failure to conform to some social "norms"; that evidence alone is not proof (or even support) for the proposition that "criminals" do not respond to incentives, to the prospect of pain or pleasure.[14]

We can conclude, perhaps, that those who do not obey the laws have little respect for the law *per se*,

Effect of Criminal Law Enforcement, 1 J. Legal Studies 259 (1972); Gibbs, *Crime, Punishment, and Deterrence,* 48 Sw. Soc. Sci. Q. 515 (1968). Other studies are collected in van den Haag, *Punishing Criminals* 130-142 (1975).

[14] Cf. Holmes, *The Path of the Law,* 10 Harv. L. Rev. 457, 458-459 (1897) (it is the "bad man" whom the law regards as "normal," for only when a man is "bad" must the law depend on its threats of pain to change his behavior).

and in that sense lack a "normal" trait. But we cannot conclude that all criminals are completely insensitive to deterrence merely because they commit crimes; we can validly conclude only that they have evaluated the prospects of success (and the "cost" to them of apprehension) differently from those who have the propensity to offend but do not. See Packer, *The Limits of the Criminal Sanction* 40-45 (1968). Indeed, the efforts of most criminals to avoid detection, and to escape after being caught, show very clearly that they are sensitive to a calculus of pains and pleasures.

Similarly, although there are many crimes committed in such intense passion that the offender may altogether neglect to consider the prospect of punishment in the future, the existence of such people and such crimes of passion does not indicate that there are no deterrable crimes. Some murders are committed for money, some after lengthy contemplation. Treason, espionage, sabotage, aircraft piracy and deliberate wrecking of trains (all of them federal capital offenses) are prime examples of entire categories of offense committed after calculation and in pursuit of ulterior goals. The people who commit such crimes are rational (albeit misguided or evil) individuals, and there is no reason to believe they will not attend their own self-interest and consider the potential severity of the penalty that might be meted out in response. These crimes (at least) are sufficiently narrow and clearly defined, and sufficiently open to dissuasion by deterrence, that capital

punishment is permissible for them regardless of its deterrent value as applied to other crimes.[15] The death penalty could realistically be made a fully predictable response to these crimes, and those contemplating such criminal activity could be required to take into account a very great probability of execution if caught.

Moreover, although an individual may use a weapon in a fit of passion, the decision to carry a weapon at all is made with a cool head and (often) considerable forethought. The prospect that he will find himself unable or unwilling to control the use of that weapon may cause many people not to possess or carry it, and consequently decrease the number of "passionate" killings. Legislators may also legitimately conclude that many crimes committed in passion are deterrable even if some are not, and that the death penalty is appropriately applied to the entire category to save as many innocent lives as possible. The choice of crimes for which capital punishment is to be authorized is, unless indisputably aberrant and grossly disproportionate, a legislative choice.

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[15] The Supreme Judicial Court of Massachusetts recently struck down under the Massachusetts Constitution a pre-*Furman* death penalty statute. *Commonwealth* v. *O'Neal*, 339 N.E.2d 676. The Justices divided four to three on the constitutional question. Two of the four Justices in the majority expressly noted that capital punishment might well be constitutional for carefully described categories of clearly deterrable crimes. See 339 N.E.2d at 694 (Hennessey, J., concurring); *id.* at 695 (Wilkins, J., concurring).

Legislators are not alone in believing that the death penalty is a more effective deterrent than is life imprisonment. A recent study has tentatively concluded that when capital punishment was *actually used* a significant number of lives were saved: over the period studied, and after controlling for the effects of other variables, using the death penalty instead of imprisonment may have deterred approximately eight murders for each execution actually carried out. See Ehrlich, *The Deterrent Effect of Capital Punishment*, 65 Am. Econ. Rev. 397 (1975).[16] Two statisticians, although critical of some of Professor Ehrlich's technical methods, have duplicated his results; using data other than those used by Ehrlich, these investigators produced "results * * * similar to Ehrlich's." Bowers and Pierce, *The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment*, 85 Yale L. J. 187, 196 (1975) (footnote omitted). Moreover, another recent study, using methodology significantly different from Ehrlich's, has concluded that Ehrlich actually underestimated the deterrent force of capital punishment by a factor of five "and that the evidence is better consistent with the view that one execution will deter at least 50 homicides." Yunker, *The Deterrent Effect of Capital Punishment: Comment* (unpublished manuscript).[17] See also Schuessler, *The Deterrent Influence of the Death Penalty*, 284 Annals 54, 60 (1952) ("The correlation between these two indices [the number of executions per 1,000 homicides and the homicide rate in 41 death penalty states] was -.26, indicating a slight tendency for the homicide rate to diminish as the probability of execution increases."). These studies provide important empirical support for the *a priori* logical belief that the use of the death penalty decreases the number of murders.[18]

[16] This paper is a revised and shortened version of Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 18 National Bureau of Economic Research Working Papers (November 1973), which we lodged with the Court in connection with *Fowler* v. *North Carolina*, No. 73-7031.

Other studies of the deterrent value of the death penalty (see, *e.g.*, Sellin, *The Death Penalty* (1959)) have not concluded that there is proof that capital punishment deters crime. But neither have they supplied proof that it fails to deter. Zimring & Hawkins, *supra*, at 254-255, 257-258. All of the earlier studies that have found no measurable deterrent effect from the death penalty have shared certain investigatory flaws. For example, these studies have relied not upon the actual *use* of the death penalty, but upon its statutory authorization, as the independent variable against which the murder rate was compared.[19] The

[17] We are lodging 10 copies of the Yunker manuscript with the Clerk for distribution to the Court and have furnished a copy of the manuscript to counsel for the parties.

[18] Several commentators have criticized Professor Ehrlich's work. For the reasons we discuss at pages 43-45, *infra*, we believe that this criticism is irrelevant because legislatures, not courts, must resolve such debates. However that may be, we discuss in Appendix B, *infra*, the debate between Ehrlich and his critics.

[19] In fact, of the nine pairs of contiguous states studies by Bowers, eight pairs included a "death penalty state" that was

effects of mere statutory authorization of capital punishment tell us nothing about the effects of its use, as Sellin himself admitted. Sellin, *supra*, at 20. All of the studies have evaluated the effect of the death penalty on the overall murder rate, rather than on the rate of capital murders, and so the studies cannot exclude the possibility that the death penalty deters the commission of those murders to which it applies.[20] None of the studies has attempted to isolate the effect of the death penalty on special and highly deterrable capital crimes, such as murder for hire. And, perhaps most importantly, all of the earlier studies failed to hold constant factors other than the death penalty that might influence the rate of murders. Only if the death penalty is the sole determinant of the murder rate, or if other determinants are identical in states having different execution rates, would it be proper to infer from these studies that the death penalty has no deterrent effect.[21]

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de facto abolitionist. Bowers, *Executions in America* 137-163 (1974).

[20] Commentators frequently have explained why the statistical material on the death penalty's deterrent value has until now been inconclusive. See, *e.g.*, S. Rep. No. 93-721, 93d Cong., 1st Sess. 8-11 (1974); Royal Commission on Capital Punishment, *supra*, at ¶¶ 62-67; 2 *Working Papers of the National Commission on Reform of the Federal Criminal Laws* 1354 (1970); Gibbs, *Crime, Punishment, and Deterrence*, 48 Sw. Soc. Sci. Q. 515 (1968); Hart, *Murder and the Principles of Punishment: England and the United States*, 52 Nw. U. L. Rev. 433, 457 (1957).

[21] In any event, we do not think that the meaning of the Eighth Amendment should turn on the results of the latest

But states—even the contiguous states studies by Sellin—have important differences. Indeed, these very differences may explain why one state chooses to use the death penalty and another does not, and still other differences might have an independent effect directly on the rate of violent crime. Or suppose that a state that had abolished capital punishment also had a high arrest and conviction rate for murder, so that although a murderer would be punished less severely, his expectation of net punishment would be greater in this state than in a state with capital punishment but a low arrest and conviction rate. Unless factors such as this are held constant—as the most recent studies have done—no valid conclusions may be drawn. As one opponent of capital punishment has remarked about the previous studies:

> The inescapable flaw is, of course, that social conditions in any state are not constant through time, and that social conditions are not the same in any two states. If an effect [from the presence or absence of capital punishment] were observed (and the observed effects, one way or another, are not large) then one could not at all

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social science research. Neither should it turn on the secular trend in the murder rate, although it could be argued that, if the Court declared the death penalty unconstitutional and the murder rate increased, the increase would be evidence that a deterrent had been removed, and hence that the death penalty would again be constitutional. The alternative, that society would have to accept a higher murder rate because of a mistaken empirical estimate by the judiciary, seems unacceptable.

> tell whether any of this effect is attributable to the presence or absence of capital punishment. A "scientific"—that is to say, a soundly based—conclusion is simply impossible * * *. [Black, *Capital Punishment: The Inevitability of Caprice and Mistake* 25-26 (1974).]

Professor Passell, upon whom petitioners rely (*Jurek* Pet. Br. App. 2, Sub-app. E), agrees. He has written: "It cannot be proven that executions do not serve as a deterrent to murder. Proof is simply beyond the capacities of empirical social science." Passell, *The Deterrent Effect of the Death Penalty: A Statistical Test*, 28 Stan. L. Rev. 61, 79 (1975). And, he writes (*id.* at 62-63), "even were one to accept without qualification the validity of the [pre-Ehrlich] research designs and the accuracy of the data employed, their evidence against deterrence could not be considered conclusive."

The older studies suggesting that capital punishment has no observable deterrent effect are deficient in yet another respect. Their results may have been produced by an entirely practical problem: the real deterrent value of capital punishment may be sufficiently small in relation to the number of murders committed each year that it is difficult to detect, given the deficiencies in data gathering (many crimes are not reported, and changes in the reporting rate are impossible to detect; in some cases it is difficult to determine whether a particular death is a "murder") and the very bulk of the raw data. In recent years there have been more than 15,000 murders per

year,[22] so that even if one execution deterred 10 murders, the effect on the murder rate might become lost in the statistical "noise."

We submit that the states are entitled to make use of the death penalty even if the effects are "small" in comparison to the gross murder rate. We do not imply by this argument that the deterrent value of capital punishment is "small" in human terms; every murder is supremely important to the victim and to his or her family and acquaintances. Indeed, it is supremely important to society, its morale, its sense of community, its sense of the security not only of lives but of values. Suppose that a state finds it necessary to impose the death penalty only a few (two, three or four) times yearly on the worst offenders. In all probability the resultant difference in the capital murder rate will be difficult to detect by even the most powerful statistical techniques. Yet the deterrent effect may be real—and the state is entitled to take the measures necessary to save the several lives that would be lost in the absence of the death penalty. A "small" saving in human life is not so insignificant or immaterial that it can be brushed aside as a permissible basis for legislative judgment.

In sum, although the evidence supporting the logical position that the death penalty deters capital

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[22] Approximately 20,600 murders were committed in 1974. Uniform Crime Reports of the Federal Bureau of Investigation, *Crime in the United States 1974*, pp. 15-19 (1975). Of course, not all of these murders were defined as capital crimes. There is no accurate data indicating the number of capital crimes committed each year.

crimes more effectively than life imprisonment is not yet conclusive, the evidence that there is no deterrent value will never be, and indeed cannot ever be, conclusive. The debate will persist unless and until the evidence of deterrence becomes conclusive, a possibility not to be ruled out. And so long as rational men can debate whether the death penalty deters crime, legislatures should be allowed to resolve that question for themselves and to act upon their decision free from interference by a judicial body that is neither well situated to collect and sift facts nor charged by the Constitution with that task. "[I]n passing on the validity of [legislation], it is not the province of a court to hear and examine evidence for the purpose of deciding again a question which the legislature has already decided. Its function is only to determine whether it is possible to say that the legislative decision is without rational basis. * * * [W]here, as here, the evidence * * * shows that it is at least a debatable question * * *, decision is for the legislature and not the courts." *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583, 594. Congress and 35 states have resolved the debate in favor of capital punishment. "It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations * * *. It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the con-

flict as it did." *Katzenbach* v. *Morgan*, 384 U.S. 641, 653."

2. ***Capital Punishment Reinforces Important Social Values.***

a. *Expression of Moral Outrage.*

Just as the legislature legitimately may conclude that capital punishment deters crime, so it may conclude that capital punishment serves a vital social function as society's expression of moral outrage. Although sometimes capital punishment is authorized for a crime because society views that crime as serious, the use of capital punishment itself also has an effect on society's view of the crime. Capital punishment marks some crimes as particularly outrageous and offensive, and therefore to be avoided by those individuals with even a trace of social responsibility.[24]

> There is a heavy symbolic significance in the operation of the criminal sanction; for the process of ascribing guilt, responsibility, and punishment goes on day after day against the background of all human history. * * * It is not

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[23] See also *Munn* v. *Illinois*, 94 U.S. 113, 132; *Powell* v. *Pennsylvania*, 127 U.S. 678, 685. See generally Cox, *The Role of Congress in Constitutional Determinations*, 40 U. Cin. L. Rev. 199 (1971).

[24] This effect should be distinguished from deterrence; it achieves obedience to the law's commands not because of the anticipation of punishment but because some individuals will shrink from committing "serious" crimes that strike at the heart of the social order, regardless of the punishment anticipated.

> simply the threat of punishment or its actual imposition that contributes to the total deterrent effect but the entire criminal process, standing as a paradigm of good and evil, in which we are reminded by devices far more subtle than literal threats that the wicked do not flourish. These public rituals, it is plausible to suppose, strengthen the identification of the majority with a value-system that places a premium on law-abiding behavior. [Packer, *The Limits of the Criminal Sanction* 43-44 (1968).]

Moreover, this venting of outrage at the violation of society's most important rules—"retribution" perhaps, although stripped of its vindictiveness—is itself an important, perhaps a necessary, social function, and has been approved by the most respected commentators (see, *e.g.*, Packer, *supra*, at 36-37; Royal Commission on Capital Punishment, *supra*, at ¶ 53; Cohen, *Reason and Law* 50 (1950); Hart, *The Aims of the Criminal Law*, 23 L. & Contemp. Prob. 401 (1958)) and by this Court. It is difficult to imagine any social goal other than "retribution" served by the execution of Nazi leaders for war crimes and genocide (cf. *In re Yamashita*, 327 U.S. 1). A criminal justice theory that rested entirely upon deterrence would have been unable to support any punishment whatever for Adolf Hitler, had he been captured, and his chief lieutenants. That example alone should warn against the denigration of "retribution" as a completely legitimate social response to truly heinous crimes.

Although the social cohesiveness function served by "retribution" is not the entire end of criminal punishment, it is not a forbidden end, or inconsistent with our respect for ourselves or the dignity of others. See, *e.g.*, *Williams* v. *New York*, 337 U.S. 241, 248; *Powell* v. *Texas*, 392 U.S. 514, 530-531 (opinion of Marshall, J.). Sometimes nothing less is required to reinforce our respect for ourselves or the dignity of others.[25]

> [W]ithout a sense of retribution we may lose our sense of wrong. Retribution in punishment is an expression of the community's disapproval of crime, and if this retribution is not given recognition then the disapproval may also disappear. A community which is too ready to forgive the wrongdoer may end by condoning the crime.

Goodhart, *English Law and the Moral Law* 93 (1953).

Perhaps the mixture of reprobation and expiation known as "retribution" is disapproved by some hu-

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[25] Or as Lord Justice Denning stated to the Royal Commission on Capital Punishment, *supra*, at ¶ 53:

> The punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformative or preventive and nothing else. * * * The ultimate justification of any punishment is not that it is a deterrent, but that it is the emphatic denunciation by the community of a crime: and from this point of view, there are some murders which, in the present state of public opinion, demand the most emphatic denunciation of all, namely the death penalty.

manitarian and behavioral theorists, but that theoretical disapproval is utterly inadequate to support a constitutional rejection of a carefully considered and rationally supported legislative judgment.

b. *Death is Not Excessive in Relation to All Crimes.*

It has been argued by some that although punishment in general appropriately may be used to deter crimes and express the society's moral outrage over certain crimes, death is always an excessive device even when applied to these legitimate ends. We submit, however, that capital punishment is not excessive in comparison to all provocations and social needs. The "uniqueness" and finality of the death penalty cut two ways: although death becomes an especial object of moral concern, it also becomes uniquely appropriate as society's ultimate sanction, all the more appropriate to the perpetrators of "ultimate" crimes because death alone can be the "ultimate" penalty.

To say that death is inevitably excessive because it affronts human dignity, or imposes suffering, is to beg the question. All punishments offend human dignity and impose suffering to some degree; although capital punishment may be harsh, or even repellent to some, it does not follow that it is "excessive."

> [T]here are a number of things we do not wish to think about that are disgusting and perhaps revolting but that we also acknowledge as necessary. Enemas, the vivisection of monkeys, cleaning up outhouses, all are disgusting or abhorrent, but they may also be necessary. Imprisonment is abhorrent—people would find it so if they knew more about it—but it is hardly, in itself, cruel and unusual punishment. [Polsby, *The Death of Capital Punishment? Furman* v. *Georgia*, 1972 Sup. Ct. Rev. 1, 24.]

We do not contend that death is an appropriate response to any crime the legislature might, in an academic hypothetical, be imagined to select, or that it is never excessive in relation to the crime and to alternative methods of punishment. But there are at least some crimes so serious, so qualitatively different from other crimes, that a qualitatively different penalty is called for out of our understanding of the seriousness of the offense. The Eighth Amendment does not bar such a penalty.

> There is one crime for which neither fines nor incarceration may provide an adequate remedy: murder. The cost to the victim is very high, and may indeed approach infinity * * *. * * * Even prolonged incarceration may not impose on the murderer costs equal to those of the victim.

Posner, *Economic Analysis of Law* 364 (1973). At least in relation to murder death is manifestly "proportional" and hence not excessive. And, of course, it is arguably even more appropriate in relation to certain aggravated forms of murder; there are some crimes so heinous that death seems the only appropriate social reply consistent with our beliefs about the seriousness of the offense. Any more "moderate" reply denigrates the seriousness of the crime and the loss to the victims.

3. ***Capital Punishment Incapacitates Dangerous Offenders.***

It is, perhaps, almost too obvious to dwell upon that those who have been executed cannot commit additional capital crimes. Their execution incapacitates them and saves the lives of those whom they would have killed if they had been allowed to remain alive.

It has been argued in response that the recidivism rate for murder is low, and that incapacitation therefore is not an adequate justification for capital punishment. Although the premise is correct, the conclusion does not follow. There are some sociopathic individuals who, although not insane by any definition, are so immune to normal forms of social control that they are quite apt to commit additional murders even if sentenced to life imprisonment without possibility of parole. These individuals can be detected, and, once detected, it should be constitutionally permissible to execute them.

For example, the defendant in *State* v. *Jarrette*, 284 N.C. 625, petition for a writ of certiorari pending, No. 73-6877, was sentenced to a term of imprisonment for two separate murders. While serving that term he escaped and, within two days of his escape, kidnapped and raped a 16-year-old girl and robbed and murdered a 16-year-old boy. We submit that this defendant has sufficiently indicated a proclivity repeatedly to commit heinous offenses so that execution would be justified solely by the need to incapacitate him. Petitioner Jurek also may be within this category. Within the federal prison system

there are a number of individuals who have been placed into administrative segregation on a continuous basis because, even in the carefully structured prison existence, they are essentially uncontrollable and likely to commit additional violent offenses that might result in death.[26]

We would scarcely argue that the need to incapacitate certain offenders is a good ground for the execution of all offenders. But offenders may by their actions become open to capital punishment under this rationale, perhaps after committing a second murder.[27] In any event, this justification for capital punishment, like the other justifications, does not stand alone. It is cumulative with the others; together, even if not separately, they indicate that legislatures rationally could decide that capital punishment is an appropriate response to some crimes. The Constitution requires no more.

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[26] The Bureau of Prisons holds one individual who has been convicted of killing three people while in prison. No action other than execution (or, perhaps, constant and heavy sedation) can surely prevent him from killing again. The Bureau holds 20 other individuals who, while serving sentences of 25 years or more for various crimes, have been convicted of murdering a fellow inmate or a member of the prison staff. The prospect of an additional sentence of imprisonment is unlikely to dissuade these individuals from their pattern of aggressive behavior.

[27] See 49 U.S.C. (Supp. IV) 1473(c)(7)(B)(i), reprinted in App. C, *infra*, pages 22a-23a; Section 2401(a)(2)(B) of the proposed revision to the federal criminal code, reprinted in App. D, *infra*, page 25a.

B. Capital Punishment Is Accepted by Modern American Society

The best available evidence that the public has not rejected capital punishment lies in the actions of the representatives of that public. Since the decision less than four years ago in *Furman* v. *Georgia*, *supra*, at least thirty-five states (*Fowler* Pet. Br. App. A; *Jurek* Pet. Br. App. 2, Sub-app. A and App. 4) and the United States (App. C, *infra*) have enacted statutes providing for the death penalty for at least some crimes, and other states are considering whether to take similar action. Such statutes could not have been enacted in so many states in such a short period of time if our society rejected capital punishment.

This blunt fact cannot be avoided with the contention that elected legislators and chief executives do not necessarily reflect the moral belief of the communities they represent. They certainly reflect it more accurately than does the judiciary, which was made independent precisely in order to insulate judges from majority sentiment. The assumption underlying representative democracy is that the legislative process reflects the will of the people, and that if legislators interpret this will inaccurately new legislators, more sensitive to the public's desires, will be elected and unacceptable laws repealed. Petitioners dispute that assumption and seek an anomalous referendum among judges as a proxy for the "true" will of the electorate. That is not the function of judicial review in our constitutional system.

The attempt to attack capital punishment by distinguishing between the people and their elected representatives fails on other grounds as well. If the distinction were to be made, the salient difference that appears is that the representatives are better informed than the electorate. The former have had to debate the issue of capital punishment, to listen to the arguments for and against, and to confront and make the moral and prudential choices.

Petitioners' object of distinguishing between the society and its representatives, however, is not to prove that the generality of voters are better informed or more "enlightened" morally than their representatives but to suggest, in fact to speculate, that the sentiment of the public, contrary to that of the representatives, may be against capital punishment. That speculation may not properly be entertained by a court reviewing a legislative determination. A court's constitutional function does not encompass guessing what a referendum might show.

If such speculation were relevant, however, what direct evidence there is suggests that the people themselves support the death penalty; there is no social consensus that the ultimate punishment is barbaric, or even that it is offensive. Far from it. For example, after the Supreme Court of California struck down the death penalty under that state's constitution, the people of California promptly amended their constitution by initiative. The vote in favor of the initiative was overwhelming. California Constitution Art. I, § 27. A referendum in 1968 in Massachusetts

showed that the citizens of that state also support capital punishment.[28] Evidence from public opinion polls also indicates that popular support for the death penalty has been increasing in recent years and that supporters of capital punishment outnumber opponents by a ratio of two to one. See S. Rep. No. 93-721, 93d Cong., 1st Sess. 13-14 (1974) (reprinting polls). Cf. Vidmar & Ellsworth, *Public Opinion and the Death Penalty*, 26 Stan. L. Rev. 1245, 1249 (1974). We do not introduce the results of these polls as a suggestion that the constitutionality of a particular penalty depends on today's straw polls. The interpretation of survey research may be a legislative function; it is not a judicial function. We cite it merely to demonstrate that, even if one proceeded on an incorrect view of the judicial function, the evidence necessary to a judgment against the death penalty is not only absent but contradicted. The polls offer no evidence that the public rejects or is revolted by the idea of capital punishment; instead, the public supports the penalty.

There is other and more persuasive evidence of the feelings of the people in general. No defendant may be sent to his death unless he first is convicted by a jury of his peers, and that conviction requires the unanimous vote of twelve.[29] If there were overwhelm-

[28] The results are reproduced in *Commonwealth* v. *O'Neal*, *supra*, 339 N.E.2d at 708 (Reardon, J., dissenting).

[29] No state provides for capital juries of less than twelve, and none allows conviction of such an offense by other than unanimous vote. See *Johnson* v. *Louisiana*, 406 U.S. 356; *Apodaca* v. *Oregon*, 406 U.S. 404; *Williams* v. *Florida*, 399 U.S. 78, 89, 103.

ing rejection of the death penalty in the community, juries (which may not be death-qualified, *Witherspoon* v. *Illinois*, 391 U.S. 510) would fail to reach verdicts condemning men to death. But the fact that there have been more than 150 such convictions and death sentences in 1974 alone demonstrates that this is not so. Some juries may fail to convict; many do convict, unanimously.

The only remaining indicia from which it might be concluded that the death penalty actually has been rejected by society at large is the fact that death in recent years has been imposed on only a small number of those who have committed capital crimes. The argument proceeds to the false conclusion that this demonstrates that public acceptance of the idea of capital punishment is a mirage—that capital punishment is accepted in theory but rejected in fact.

To a great extent the decline in the use of capital punishment in recent years is the effect of judicial activity—of stays forbidding the death penalty pending completion of additional litigation and collateral attacks; of judicial willingness to find in a capital case error that would be unnoticed or "harmless" in another case; of an expanded arsenal of procedural claims available for collateral attack; of the *Furman* decision itself and the litigation that preceded it. Such inactivity as has resulted from these causes shows no rejection of the death penalty itself; it shows at most that the criminal justice system is

increasingly willing to examine the propriety of a particular death penalty. To the extent executions have been stayed by the federal judiciary, the "trend" against capital punishment has been produced by individuals not accountable to the will of the people. Federal judges were afforded life tenure in order to provide insulation from such influences, and it would therefore be inaccurate to interpret judicial queasiness over capital punishment as an expression of the popular will.

To the extent that the decrease in the number of deaths by execution in recent years has been the result of legislative or executive activity, it is consistent with explanations other than "rejection" of the use of death as an instrument of social policy:

> To be sure, the penalty of death is infrequently imposed. An entirely valid inference from this bare fact would be, not that the society has repudiated the penalty, but that it wishes to preserve its use to a small number of cases. A reluctance to impose a penalty is not necessarily the same as its repudiation. Reluctance may spring from moral revulsion; but it may just as commonly proceed from a humane and heartfelt sorrow.

Polsby, *supra*, at 20. A reverence for the importance of human life may explain a thoroughly considered (and entirely acceptable) social policy to limit to a minimum the number who must be put to death, while reserving that extreme penalty to a few extreme cases. Perhaps, alternatively, reserving the

sanction to a few "exemplary" cases, sparing others who might be "eligible" to die but whose deaths would add little to whatever social goals can be served by some lesser number of executions. The Constitution ought not to be read to compel the state to engage in mass executions in order to preserve the power to execute anyone at all.

C. Differences of Opinion Concerning the Propriety of the Death Penalty Must Be Resolved in Favor of the Legislative Judgment

We have suggested that the cruel and unusual punishments clause of the Eighth Amendment, understood in its historical context, properly is interpreted as a device for enforcing the overwhelming social consensus of the times, and properly may be used to curb aberrations occurring when isolated individuals (or legislatures), through ignorance or malice, flaunt those standards and create or impose punishments utterly unacceptable to society and degrading to society's dignity. This statement of the scope of the amendment carries with it a statement about the limits of judicial review. A punishment is not "cruel and unusual" unless utterly outside the bounds of social tolerance.

The bases of support for capital punishment that we have discussed above suggest that, wherever the bounds of social tolerance may be, they are not exceeded by capital punishment. It is approved by many legislatures and imposed by numerous unanimous juries. It is supported by substantial majorities in

opinion polls. It is not excessive when compared to crimes such as murder. There is room for legislative debate and honest difference of opinion concerning whether it deters others and expresses legitimate social approbation of heinous deeds.

The careful balance of considerations supporting the death penalty against the moral or humane concerns of those who oppose death perhaps accounts for the great debate capital punishment has generated throughout the history of this country.[30] It has been a subject of debate since the founding of the republic (see, *e.g.*, Bradford, *An Enquiry How Far the Punishment of Death is Necessary in Pennsylvania* (1793)), and the debate bids well to continue. It has been a subject of intense debate precisely because there is much to be said on each side, and because neither proponent nor opponent has any argument that must convince all rational people of that side's validity.

Even if the cruel and unusual punishments clause were not limited to enforcing a social consensus that has broken down in an individual case, the propriety of the death penalty would nevertheless be apparent.

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[30] What better evidence of the equipoise of the debate, and consequently of the validity of legislative choice, than this concession (*Fowler* Pet. Br. 118-119): "The opposition to capital punishment * * * has been vigorously asserted on the basis of 'fundamental moral and societal values in our civilization and in our society.' Proponents of the death penalty have responded with equal moral fervor. Surely no other criminal sanction has evoked such passionate, ceaseless philosophical argument" (footnotes omitted).

The death penalty is rationally supported and rationally supportable: reasonable men can and do disagree about the merits of capital punishment, but reasonable men cannot say that no reasonable man would support the death penalty. Because the evidence and the moral concerns are so balanced, the Court cannot conclude that the legislatures and juries have made such a "clear mistake" (cf. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129 (1893)), that their considered deliberations must be disregarded and the law set aside. Or, as Judge Learned Hand put the matter, when dealing with an amendment that grew out of the seventeenth century procedural victories of Parliament over the Crown:

> [I]n such cases I cannot see why courts should intervene, unless it appears that the statutes are not honest choices between values and sacrifices honestly appraised.

Hand, *The Bill of Rights* 66 (1958).

There are in this area no clear mistakes by the legislature. A given legislature may be "mistaken" in applying capital punishment to a given crime or another legislature may be equally "mistaken" in failing to apply it. Indeed, there seems to be no way to exclude the possibility that an omniscient observer would conclude that all legislatures were mistaken in believing that capital punishment is ever appropriate or, to the contrary, that capital punishment is appropriate to many more instances of crime than legis-

latures and juries now believe. But the data such an omniscient observer would use, and the standards he would apply when weighing the moral values implicated in the death penalty, are beyond the ken of courts and perhaps beyond the ken of mankind. There are no neutral principles by which the death penalty may be condemned; there is nothing more than a belief that the legislature, after consideration of weighty policy considerations on both sides, may have chosen the "unwise" course. That is not enough. Courts

> are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches us that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.
>
> Primary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the Congress. The nature of the power to be exercised by this Court has been delineated in decisions not charged with the emotional appeal of situations such as those now before us. We are to set aside the judgment of those whose duty it is to legislate only if there is no reasonable basis for it. * * * Beyond these powers we must not go; we must scrupulously observe the narrow limits of judicial authority even though self-restraint is alone set over us.

Dennis v. *United States*, 341 U.S. 494, 525-526 (Frankfurter, J., concurring).

The core of petitioners' argument is that Congress and 35 state legislatures have lost their moral compass and can no longer be trusted to legislate in the interest of the entire people. Petitioners ask this Court to assume the tasks of those legislatures that do not share their moral values. That, of course, is not the constitutional function assigned the federal judiciary.

D. Several of the Empirical Observations by the Justices Who Concurred in *Furman* Require Reassessment in Light of Subsequent Evidence

The Justices who comprised the majority in *Furman* advanced several rationales for their decisions. Some of the arguments have their roots in the history of the cruel and unusual punishments clause. We have addressed these arguments at pages 16-34, *supra*. Other of the arguments are more factual in nature and were facilitated by a number of essentially empirical observations about the nature and utility of capital punishment. We believe that the force of many of these arguments has been eroded by post-*Furman* developments, and that others are factual arguments properly within the legislative sphere.

1. At least two of the Justices who concurred in *Furman* relied upon the belief that the "legislative will is not frustrated if the [death] penalty is never

imposed" (408 U.S. at 311 (White, J., concurring); *id.* at 309 (Stewart, J., concurring)). That is an empirical observation. At the time *Furman* was decided, the validity of that statement could have been disputed. But we submit that the evidence is now in, and that there is no longer room for doubt. Congress and the state legislatures have responded to *Furman* by enacting statutes that disclose their will. Indeed, several states enacted mandatory death penalty statutes; given by this Court's decision in *Furman* what they believed to be a choice between sentencing all of those convicted of first degree murder to death, and sentencing all to life imprisonment, these states selected death. Some legislatures have responded to *Furman* not by extending mercy to all, but by removing mercy that previously had been extended to some. It is now clear that the legislative will *is* frustrated unless the death penalty is imposed upon some individuals.

2. At least three Justices expressed the view in *Furman* that capital punishment is cruel because it "goes beyond what is necessary not only in degree, but in kind." See 408 U.S. at 287-290, 301-302 (Brennan, J., concurring); *id.* at 306, 309 (Stewart, J., concurring); *id.* at 347-354 (Marshall, J., concurring). This proposition, too, is empirical. Its validity depends upon the meaning of the word "necessary." If that word refers to the perceptions of legislatures, any doubts that may have existed now have been resolved, for legislature after legislature has responded to *Furman* by enacting (or reenacting)

capital punishment statutes, demonstrating that the legislature believes that capital punishment is "necessary."

The proposition might alternatively be an objective observation of either of two sorts. The first—the "strong" sense of "necessary"—is that capital punishment is not necessary because modern society can survive without it. But this would be a test without any support in the Constitution. No legislation is required to stand or fall on the question whether that particular law is essential, is a *sine qua non*, for the preservation of our way of life. The death penalty obviously is not necessary in this strong sense, nor need it be.

The weaker sense of "necessary" is used in constitutional adjudication: a statute passes constitutional muster if it serves ascertainable legislative purposes.[31] The argument then would be that the death penalty is not "necessary" because it serves no useful purpose. We have discussed at pages 34-51, *supra*, of this brief the purposes served by capital punishment. Although there may be debate concerning the effectiveness of capital punishment in achieving these ends, we do not see how it is possible to contend that it would be arbitrary or irrational for a legislature to resolve such disputes in favor of the effectiveness (and hence "necessity") of capital punishment. The

[31] See, *e.g.*, *Marshall* v. *United States*, 414 U.S. 417, which uses this standard to adjudicate a challenge to the rationality of a statute imprisoning some criminals while allowing others to receive treatment.

empirical nature of the dispute suggests that legislative resolution is appropriate.

3. Mr. Justice White argued (408 U.S. at 312) that "a major goal of the criminal law—to deter others by punishing the convicted criminal—would not be substantially served where the penalty is so seldom invoked that it ceases to be the credible threat essential to influence the conduct of others. * * * [C]ommon sense and experience tell us that seldom-enforced laws become ineffective measures for controlling human conduct and that the death penalty, unless imposed with sufficient frequency, will make little contribution to deterring those crimes for which it may be exacted." See also *id.* at 309 (Stewart, J., concurring).

It is now clear that some states, of which North Carolina is one example, are willing to impose the death penalty with substantial frequency. The concern of Mr. Justice White would not apply to these states. But even as to other states that elect to make less use of the death penalty, this argument is empirical, and we do not believe that it is accurate. Some states simply have made the legislative judgment that their ends can be achieved without the need to execute large numbers of people, that such harshness would be unnecessary. What judicially ascertainable facts would enable the Court to impeach this judgment? If the legislature is entitled to conclude that 100 executions would deter 500 murders, by what standard could a court conclude that five executions would

deter none?" [22] A legislature entitled to conclude that 100 executions would deter 500 murders also is entitled to conclude, based on the available evidence, that five executions would deter 25 murders. It equally properly could conclude that five executions would deter 50 murders, for there may be diminishing returns to executions, just as there are diminishing returns to many of our other activities. A few executions in a state each year might well generate as much publicity as many executions, and if potential criminals desire to avoid the *risk* of execution as well as the actuality of it many would hesitate—and some would desist—from committing murder.

But the core of the matter is simply that it is for the legislatures to choose the goals that will be pursued. There is no constitutional requirement that the legislature must select the goal of deterring a substantial number of murders yearly. As we have said before, a "small" saving in human life achieved by a "small" deterrent effect is not so insignificant that it can be denigrated as a permissible basis for legislative choice. See pages 42-43, *supra*.

III. CAPITAL PUNISHMENT IS NOT IMPOSED ON THE BASIS OF RACE

The selection of those to be executed might be open to serious question if it were influenced by the

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[22] Cf. *Buckley* v. *Valeo*, No. 75-436, decided January 30, 1976, Mr. Justice White, concurring and dissenting, slip op. 5-11.

race of the defendant. We submit that the data do not show that race is a factor.[33] We have included in Appendix A to this brief an analysis of the findings of the studies relied upon by petitioners and others. These studies contradict each other, and the most recent (and sophisticated) study, the Stanford Note (*A Study of the California Penalty Jury in First-Degree-Murder Cases: Standardless Sentencing*, 21 Stan. L. Rev. 1297 (1969)), found no evidence whatever of racial discrimination in capital punishment for murder. We are aware of no properly-conducted study that supports a contrary conclusion.

The only studies that even inferentially suggest a possibility of racial discrimination were conducted in the South during a time when blacks were often excluded from grand and petit juries. They do not demonstrate that discrimination persists now that blacks sit in judgment on other blacks. It is true that both the National Prisoner Statistics (Law Enforcement Assistance Administration, *Capital Punishment 1974*, Table 16 (1975)) and information compiled by the NAACP (*Jurek* Pet. Br. 83-84, n.147) indicate that approximately 50 to 60 percent of all those sentenced to death are black. This is only the beginning of the inquiry, however. In order to determine whether this indicates discrimination, we would need to know what proportion of all

[33] See also *Furman* v. *Georgia*, *supra*, 408 U.S. at 389-390, n.12 (Burger, C.J., dissenting); *id.* at 310, n.14 (Stewart, J., concurring); *id.* at 447 (Powell, J., dissenting).

capital crimes are committed by blacks.[34] Although there is no direct measure of that proportion, the number of arrests for willful felonious homicide may be the closest approximation. The Uniform Crime Reports of the Federal Bureau of Investigation (*Crime in the United States 1974*, p. 191 (1975)) indicate that 57.1 percent of those arrested for willful felonious homicides are black. There is, therefore, little or no discernable discrimination against blacks from the time of arrest through the pronouncement of a sentence of death; blacks are not a higher proportion of those sentenced to die than they are of those arrested for the most serious types of murder.[35] Nor is there any evidence that blacks are arrested for their crimes more often than are whites. The evidence concerning arrest is consistent with the evidence concerning the race of the victim. Exactly half of all murder victims are black. *Crime in the United States 1974*, p. 15 (1975). If capital punishment deters murders (as legislatures are entitled to

[34] "These statistics alone, of course, do not reveal elements of judicial bias in the administration of criminal law. It is also well recognized that blacks in American society * * * have a criminal homicide rate that is between four and ten times greater than that of whites." Wolfgang and Riedel, *Race, Judicial Discretion, and the Death Penalty*, 407 Annals 119, 123 (1973). See also White, *The Role of the Social Sciences in Determining the Constitutionality of Capital Punishment*, 13 Duq. L. Rev. 279, 281-285 (1974).

[35] Many murders or other capital crimes grow out of other violent felonies. The Uniform Crime Reports indicate that blacks are arrested for these crimes, too, in disproportionate numbers. Of those arrested for robbery 62.3 percent are black; of those arrested for aggravated assault 41.2 percent are black. *Crime in the United States 1974*, p. 191 (1975).

conclude), it would follow that abolition of capital punishment would work to the detriment of the poor and the blacks, who are disproportionately the victims of murder.

If it is proper to assume that some individuals in the criminal justice system discriminate on account of race or other impermissible factors, the existence or extent of this discrimination will vary from time to time, place to place, and state to state. Proof of discrimination by the prosecutor and juries of one county in one state would not prove that petitioners in these five cases are the objects of discrimination. It is unlikely that discrimination can account for the sentences imposed upon petitioners Gregg, Jurek and Proffitt, who are white. The argument that blacks may be treated harshly when they have committed crimes against whites is not an argument against the penalty imposed upon a black who murders another black, as was the case in *Fowler*.

In short, the possibility of racial discrimination in the selection or imposition of a particular punishment depends strictly upon the facts and circumstances of the case. It is not an argument against all capital punishment for all time. Indeed, the argument has nothing whatever to do with capital punishment. *Any* punishment selected or augmented on racial grounds is impermissible. No petitioner has contended that he was discriminated against on account of his race. Accordingly, the possibility that racial discrimination exists upon occasion in the criminal justice system is not an argument against the penalty imposed upon petitioners.

IV. CAPITAL PUNISHMENT MAY BE IMPOSED UNDER THE CRIMINAL JUSTICE SYSTEM'S PRESENT PROCEDURES. EACH PROCEDURE IS EITHER REQUIRED OR PERMITTED BY THE CONSTITUTION ITSELF

Petitioners devote much of their briefs (see also *Fowler* Pet. Br. 42-101, upon which several petitioners rely) to the argument that the procedures for processing capital cases are arbitrary and capricious. Petitioners object to the discretion involved in the prosecutor's decision to charge, in plea bargaining, in the jury's determination of guilt and punishments, and in executive clemency. This "elaborate argument * * * does not need an elaborate answer." [36] Petitioners obviously do not contend for a system in which the prosecutor must charge a capital offense whenever there has been a killing, in which the defendant could not plead to a lesser offense, in which the jury must convict, in which clemency could not be exercised. We would then have the rule of the Tyrant which ancient Greece replaced with the rule of law millenia ago. The generalization that the death penalty always violates the Eighth Amendment can be made *only* because the discretion petitioners find objectionable will be inevitable so long as we have a constitutional system of criminal justice.[37]

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[36] Mr. Justice Holmes, in *United States* v. *Wurzbach*, 280 U.S. 396, 399.

[37] In regard to prosecutorial discretion, the brief in *Fowler*, upon which several petitioners rely, points out that it is

Indeed, it is strange that petitioners even frame this procedural argument in terms of the Eighth Amendment. One would have supposed that if the evil is in the process, the remedy is in the command that no person may be "deprived of life * * * without due process of law." That of course was the argument in *McGautha* v. *California*, 402 U.S. 183, 207, with respect to jury discretion, and the Court rejected it. To cast the same argument differently and say that the Eighth Amendment proscribes some unattained and unattainable system for processing capital cases is to contend that this constitutional provision contains its own refutation. The Eighth Amendment cannot mean that, although the death penalty is a permissible type of punishment, it can never be imposed under our criminal justice system because the system cannot, should not, be altered to meet petitioners' objections to it. Yet (unless we misapprehended their position) that is what petitioners would have this Court rule.

"*necessarily* and *unavoidably* arbitrary" (Br. 53) (emphasis changed).

In regard to plea bargaining, the brief notes that the acceptance of pleas to lesser offenses "is doubtless inevitable" (*id.* at 61).

In regard to the exercise of discretion by the jury, the brief does not impugn the jurors' integrity but only "acknowledge[s] that they are human" (*id.* at 75) and that there is an "inevitable propensity" for juries to alleviate the harshest of penalties (*id.* at 91-92).

In regard to executive clemency, the brief appears to recognize that the very concept encompasses discretion (*id.* at 95-96). See *Schick* v. *Reed*, 419 U.S. 256.

Petitioners state that they are not suggesting that the selective discretion present at any of the separate stages of the criminal process would be constitutionally objectionable in a non-capital case. With all respect, we submit that they are suggesting just that. There is not a single argument petitioners put forward in this regard that could not equally be made in regard, for example, to the penalty of life imprisonment for first-degree murder. Petitioners argue that the "procedure for processing capital cases involves a series of uncontrolled discretionary judgments that operate to spare the lives of some defendants while others in similar circumstances are sentenced to die." [38] If the Court accepts that proposition as the basis for striking down the death penalty, how can the Court hold unobjectionable the "procedure for processing criminal cases which involves a series of 'uncontrolled' discretionary judgments that operate to spare the liberty of some defendants while others in similar circumstances are sentenced to imprisonment?" [39]

Petitioners' analysis begs the question whether the difference in penalty is a constitutional difference. If a state properly can prescribe the death penalty for at least some crimes, as we have argued above,

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[38] See *Fowler* Pet. Br. 15.

[39] Appellate review is part of what petitioners call the "procedure for processing capital cases," yet it cannot be that the death penalty is unconstitutional because, for example, this Court has discretion to deny petitions for writs of certiorari in capital cases.

then it is impossible to turn to the Eighth Amendment as a source of a constitutionally-supported principle that this difference in the penalty imposed requires a difference in the process used. Perhaps one could argue that for due process purposes death is different because more serious, and that the process that is "due" for crimes with less severe sanctions is insufficient for more serious ones. But petitioners have eschewed the due process argument and, as we noted above, a similar due process argument failed to persuade the Court in *McGautha*.

Since a conclusion by this Court that the procedures of the criminal justice system are too discretionary will inevitably impugn those procedures in regard to penalties other than death, claims of that nature properly should be consigned to particular allegations against particular areas of discretion, rather than to an overall, and therefore less-well-focused, inquiry. Thus, for example, petitioners contend that capital crimes are so vaguely defined that a jury sometimes will have difficulty ascertaining when one has been committed. But, of course, this is not always so. There is no difficulty in the definition of murder by lying in wait, or by poison; there is little difficulty in the definition of murder for hire or in the course of a kidnapping. The definitional difficulties in other forms of murder are more considerable: premeditation and malice aforethought invite consideration of a sometimes elusive element of intent.

But if there is to be a vagueness-type challenge to a particular definition, it is a challenge potentially available to one whose conduct is within the zone of uncertainty, not one whose conduct is clearly prohibited. *Parker* v. *Levy*, 417 U.S. 733; *United States* v. *Harriss*, 347 U.S. 612, 618. The assertion that some capital statutes are vague as applied to some crimes committed by other individuals is an inadequate foundation for petitioners' contention that capital punishment itself inevitably is arbitrarily or capriciously imposed.[40]

For the foregoing reasons, we believe petitioners' procedural contention must be rejected. We are, however, somewhat hesitant to conclude our discussion of the matter at this point. The discretion inherent in our system of criminal justice may need no defense, but it serves such important goals that further elaboration is, we believe, appropriate.

A. Discretion in the Criminal Justice System Serves Important Social Functions

The need for some discretion in a system of criminal justice arises because the varieties of human

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[40] It would be more appropriate to tender more narrow challenges to other sources of discretion in the criminal justice process as well. Many of the points of choice discussed by petitioners could be altered to produce more predictable and uniform decisions in response to particularized complaint. See, *e.g.*, Ark. Stat. Ann. 41-4714 (1973 Cum. Supp.) (governor must give reasons for commuting death sentence); Ill. Rev. Stat. ch. 38, Section 1005-8-1A (1974 Cum. Supp.) (prosecutor must seek death when aggravating circumstances appear); N.Y. ch. 367, Section 10 (1974 Legis. Assembly, May 6, 1974) (defendant may not plead guilty to a capital crime).

endeavor are endless and unpredictable. The variety of the circumstances of offense and offender is so great that it cannot usefully be anticipated in a single criminal statute. Nor, for that matter, is our language sufficiently precise to enable legislation to account for these differences, even if all could be anticipated. Perhaps it approaches the limit of human abilities to specify some reasonably clear criteria that mark off those whose crimes are sufficiently serious that capital punishment is "authorized," and to provide that for at least some of those for whom it is authorized, it is also appropriate.

In the formative years of this country most statutes providing for the death penalty were "mandatory;" all convicted under them were sentenced to death. For the reasons discussed in this Court's decision in *McGautha, supra*, 402 U.S. at 196-208, this procedure was unsatisfactory because these statutes selected some men who did not merit the ultimate penalty—depending on the reaction of the jury, such individuals unjustly might be sent to death, or they might be acquitted entirely as the jury, acting as the conscience of the community, refused *despite* the evidence to convict a man whom they believe should not be executed. The conscious decision to extend to the jury the ability to do openly what it had been forced to do covertly was one of the major advances of American criminal justice:

> Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have

> confirmed the lesson taught by the history recounted above. To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability. [*McGautha, supra*, 402 U.S. at 204.]

Nevertheless, in response to this Court's decision in *Furman*, those states that have reenacted death penalty statutes have attempted to structure and confine the discretion available to the sentencing authority. One course, adopted by North Carolina and Louisiana, eliminates sentencing discretion entirely. Another course, adopted by the United States (see App. C, *infra*), Georgia, Texas and Florida, enumerates those aggravating characteristics without which no crime is "capital."[41] This, in turn (petitioners assert) simply transfers the exercise of discretion to other locations in the criminal justice system. Even if we were to agree with this premise, the conclusion that the death penalty is unconstitutional does not follow, for we believe that *McGautha* correctly concluded that some discretion is permissibly a part of the process of determining who is to be executed. Cf. *Winston* v. *United States*, 172 U.S. 303 (attempt to limit jury discretion in capital case impermissible).

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[41] See Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 Harv. L. Rev. 1690, 1699-1712 (1974), for a more complete typology of the post-*Furman* statutes.

One objective of modern criminal justice is to tailor the punishment, at least to some extent, to the offender as well as to the offense. We assume that petitioners would not embrace a rule that legitimated capital punishment only when it followed automatically and without variation from the mere fact of an offense described in the broadest possible terms; that alternative has been rejected (without the need for constitutional compulsion) by the states. Still less can be said that the Constitution *requires* that all offenders equally receive terms of life imprisonment (although we do not deny the legislatures' power to make that choice, too). Despite the superficial uniformity of such a course, there is real inequality in treating identically individuals who are different in essential characteristics and who have committed crimes factually dissimilar, even though language and human forethought are inadequate to commit all relevant differences to expression in the form of "rules." And, if the Constitution admits of any discretion in this fashion, the discretion currently present in the criminal justice system is not so excessive or unprincipled that its mere presence as a means of administering mercy precludes the imposition of any capital punishment whatsoever.

B. The Discretion in the Criminal Justice System Does Not Result in "Freakish" Imposition of Capital Punishment

Four Justices in the *Furman* majority asserted that capital punishment is unconstitutionally "unusual" because it is infrequently used. See 408 U.S.

at 256-257 (Douglas, J., concurring); *id.* at 291-292 (Brennan, J., concurring); *id.* at 309 (Stewart, J., concurring); *id.* at 312-313 (White, J., concurring).

This is a proposition that deserves further analysis. It is not immediately clear why a particular individual should be able to block his own execution (if it is otherwise justified) on the ground that not enough individuals are being executed with him. But, pretermitting that difficulty, we believe that the problem with the argument is that frequency is a relative phenomenon. Capital punishment can be "infrequent" only in relation to something else. The implicit assumption may be that frequency should be assessed in relation to the number of convictions for crimes for which the death penalty is authorized.[42]

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[42] Several Justices also intimated that capital punishment is unusual because it is imposed for a diminishing number of crimes. We do not believe that this is an argument against the death penalty; legislatures should not be taken to task for reevaluating the need for this extreme sanction and confining its use to those crimes for which it is both most appropriate (in the sense that the punishment is proportional to the offense) and most needed (in the sense that society must deter the commission of the offense and express its disapprobation). In any event, the absolute frequency of capital punishment is still quite high. *Furman* spared approximately 600 individuals; in less than four years since *Furman*, and despite the damping effect that decision produces on the use of the death penalty, more than 400 individuals have been placed under sentence of death, 151 of them in 1974 alone. Petitioner Jurek concedes that this is a "not inconsiderable" number. *Jurek* Pet. Br. 67, n.108. In large measure the "infrequency" of capital punishment is due to judicial decisions, and so cannot be assigned as an argument against the constitutionality of a legislative decision that some capital punishment is necessary.

Assuming that this is the proper standard of comparison, the available evidence indicates that when capital punishment is authorized for a serious crime it is prescribed relatively often. For example, in California, during the period studied by Note, *A Study of the California Penalty Jury in First-Degree-Murder Cases: Standardless Sentencing*, 21 Stan. L. Rev. 1297, 1299 (1969), the jury set the death penalty for 103 of 238 individuals convicted of first degree murder. In North Carolina a death sentence now is imposed upon every individual convicted of first degree murder, and there have been more than 115 such convictions in the last three years (*Woodson* Pet. Br. App. A; *Fowler* Pet. Br. App. B).

We do not believe, however, that this is the relevant comparison for constitutional purposes. It would be more appropriate to compare the number of executions carried out with the perceived need for the death penalty. Sentences of life imprisonment, too, are "infrequent" compared with sentences of five years or less. Sentences of life imprisonment are rarely carried out, for the individual subject to such a sentence often is released on parole. But this hardly establishes that life imprisonment is unconstitutionally unusual, for the constitutional concept must include an element of proportionality to the perceived social need to impose the punishment in question. The paucity of actual executions in recent years—to the extent it is attributable to explanations other than the decisions of this Court and other courts—suggests that our society has decided to con-

fine the use of its extreme sanction within fairly narrow bounds, that although a large absolute number of executions is not thought necessary, some smaller number is appropriate. See pages 42-43, 56-57, *supra*. The death penalty should not be held to be unconstitutionally unusual unless it is very infrequent in relation to the perceived need for it, and there is no reason to believe that it is infrequent under this standard.

For many of the same reasons, we respectfully suggest that the death penalty, when actually imposed, is not imposed "capriciously," "wantonly" or "freakishly" (see 408 U.S. at 309 (Stewart, J., concurring); *id.* at 295 (Brennan, J., concurring). Petitioners embellish this argument, which, as we have argued at pages 69-76, *supra*, is a Due Process attack in disguise. For that reason, if accepted, it would imperil the validity of any conceivable penalty. Is it "freakish" when an individual is sentenced to five years' imprisonment rather than three, when the statutory maximum is life imprisonment? [43] To argue that capital punishment makes a difference in this regard is to beg the question—if it can be explained *why* capital punishment makes the difference, then the constitutionality of the death penalty can be resolved in Eighth Amendment terms, *based on the nature of that difference*, without regard to the process by which it is imposed. And if the nature

[43] Cf. *Griffin* v. *Warden*, 517 F.2d 756 (C.A. 4), holding that the Due Process Clause allows a state to give a prosecutor unbridled discretion to seek life imprisonment.

of that difference cannot be drawn from the Eighth Amendment, the fact that the imposition of capital punishment is no more arbitrary than the imposition of any other particular punishment under our constitutional system of criminal justice disposes of the argument based on "arbitrariness."

To the extent the argument based upon "arbitrariness" has any content, it must be directed to the nature of the process by which the sentence has been prescribed. "[C]an there be any reason to accuse a state of arbitrariness in passing out sentences of death if the process cannot be shown to have been operated unfairly in producing this result?" Polsby, *The Death of Capital Punishment? Furman* v. *Georgia*, 1972 Sup. Ct. Rev. 1, 14. And, at this point, the argument collapses, for, as we discuss at pages 82-100, *infra*, each of the steps by which the death penalty is imposed is either required or permitted by the Constitution itself. If there is no unfairness in the process, the result of that process cannot be unfair.

It would make more sense to say that the result of the process by which death is prescribed as punishment for crime is "freakish" if some random or invidious factor were introduced that aggravated the potential punishment for specific individuals. But that is not what happens. The discretion inherent in the criminal justice system is weighted heavily in favor of mercy. The ability of the prosecutor to charge lesser crimes and to accept a plea bargain; the power of the jury to acquit altogether or to

convict of lesser included offenses; the power of the executive to grant clemency; these and other instances of discretion serve to mitigate the harshness of a penalty, not to increase its harshness. As Professor Polsby put the matter (1972 Sup. Ct. Rev. at 20):

> Consider arbitrariness. Does it follow "inescapably" that a punishment is being inflicted arbitrarily (and therefore impermissibly) when it is "inflicted in a trivial number of the cases in which it is legally available"? It seems to me inherently plausible that juries, judges, and governors of states conduct themselves with deliberation and caution so as to err on the side of mercy, reserving their ultimate punishment for those whose transgressions are most clearly established and seem to them most revolting. This explanation if it is accurate (and no one knows whether it is) is not arbitrariness but the antithesis of arbitrariness.

As the criminal justice system now stands, it is utterly impossible for one person or several persons, acting out of prejudice, malice or stupidity, to inflict the death penalty. But at every stage it is possible for one person or a small group of people to prevent its infliction. The multiplication of occasions for mercy is the system's great safeguard. It cannot simultaneously be the source of its unconstitutionality.

If the explanation from mercy is incorrect, the burden of establishing its inaccuracy should fall upon those who seek to upset the judgment of the

legislature. Petitioners have not discharged (or even shouldered) that burden."

C. Each of the Particular Sources of Discretion in the Criminal Justice System Is Either Permitted or Compelled by the Constitution Itself

Petitioners attack the discretion now possessed by prosecutors (in conjunction with the grand jury) to decide whom to charge and with what crime; the discretion of prosecutors (in conjunction with the court) to accept a plea to a lesser and non-capital

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" Moreover, even if (contrary to the fact) capital punishment were imposed upon a group selected at random, it is far from clear that this would be a constitutional defect. The governmental purpose often can be achieved by imposing a detriment on less than all of those who are "eligible" for it. When this can be done, random selection is the most fair device. There is no need to burden the entire population when the governmental purpose can be achieved by less onerous means. For example, people have been selected by lot for conscription into the military, while others, identically situated, have been excused. School assignments for elementary and secondary schools are often made by lot, where some pupils must be transported over a distance while others can be allowed to attend nearby schools. There are many other examples. So long as the criteria used for selection are not invidious, there can be no reasonable argument that such selection is constitutionally infirm.

For the reasons we have discussed above and at pages 42-43, 56-57, *supra*, there are sound reasons, grounded in mercy and humane compassion, for desiring to hold to a minimum the number who must be executed. If society could accomplish that aim by holding a lottery among all those convicted of first degree murder, how could it be unconstitutional to accomplish the same aim by a discretionary system of selection weighted in favor of mercy and considering the needs of the individual and the nature of his crime?

offense; the power of a jury to avoid a conviction that sends a defendant to his death either by acquitting in spite of the evidence or by convicting of a lesser included (and non-capital) offense; the power of the judge and jury to weigh aggravating and mitigating circumstances; and the power of the executive to grant clemency. We submit that the discretion possessed by each of these actors serves important goals of criminal justice, and for that reason has been upheld by this Court as consistent with the Constitution. Moreover, several of the sources of discretion are the result of specific constitutional commands, and any attempts to confine or eliminate the discretion would be unconstitutional. Because each of these sources of discretion is either permitted or encouraged by provisions in the Constitution other than the Eighth Amendment, the product (the sentence) of this fully acceptable process cannot itself violate the Constitution.

1. *The Charging Decision.*

A federal prosecutor has an unfettered power to decline to bring charges against any individual. The prosecutor need not seek an indictment, and under Fed. R. Crim. P. 7(c) the United States Attorney may, by declining to sign an indictment, prevent prosecution of a case in which the grand jury has concluded that there is good ground to prosecute. See *United States* v. *Cox*, 342 F.2d 167 (C.A. 5), certiorari denied *sub. nom. Cox* v. *Hauberg*, 381 U.S. 935; *In re Grand Jury January, 1969*, 315 F. Supp.

662 (D. Md.). But this prosecutorial power is to a large extent created by the Constitution itself; it inheres in the separation of the executive function from the judicial function. Both the executive and judicial branches have independent power, not subject to control by the other, over the course of such proceedings. *Buckley* v. *Valeo*, No. 75-436, decided January 30, 1976, slip op. 132-135; *The Confiscation Cases*, 7 Wall. 454; *Georgia* v. *Mitchell*, 450 F.2d 1317 (C.A.D.C.); *Powell* v. *Katzenbach*, 359 F.2d 234 (C.A.D.C.), certiorari denied, 384 U.S. 906 (collecting cases). Cf. *Linda R.S.* v. *Richard D.*, 410 U.S. 614.

The federal prosecutor's discretion not to commence criminal prosecution is thus part of our constitutionally-created system of government. It is, of course, conceivable that in particular circumstances prosecutorial discretion will be abused and slanted along racial lines (see, *e.g.*, *Yick Wo* v. *Hopkins*, 118 U.S. 356; *Littleton* v. *Berbling*, 468 F.2d 389 (C.A. 7), vacated on other grounds *sub nom. Spomer* v. *Littleton*, 414 U.S. 514) or other impermissible grounds. When that happens independent remedies are available. However, the prosecutorial discretion, which is a product of the Constitution itself, does not produce unconstitutional results merely because the prosecutor has no precise set of rules that control his prosecutorial decisions. "[T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." *Oyler* v. *Boles*, 368 U.S. 448, 456.

The prosecution is under a duty—indeed, a constitutional duty—not to charge and prosecute an individual unless the prosecutor legitimately believes that the individual can be convicted. The evaluation of that probability of conviction is a difficult one, involving an assessment of the evidence available, the predilections of witnesses, and the possibility that the jury (the composition of which is unknown) will agree with the prosecutor's evaluation. All of these factual inferences must then be analyzed against the available categories of crime that may be comprehended in a single criminal transaction, and a decision made about which prosecution would be most likely to succeed and would be most advantageous to the public welfare if successful. Finally, the prosecutor must evaluate the resources of his own office; because manpower is limited in relation to the number of crimes that have been committed, decisions sometimes must be made to forego particular prosecutions, even though there is a reasonable chance of conviction, in order to concentrate prosecutorial efforts where they may be more urgently needed.

In many civil law countries prosecutors are under a duty to prosecute all major crimes known to them. See Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. Chi. L. Rev. 439 (1974); Herrmann, *The Rule of Compulsory Prosecution and the Scope of Prosecutorial Discretion in Germany*, 41 U. Chi. L. Rev. 468 (1974). Even within these compulsory prosecution systems the prosecutor remains free to evaluate the evidence; prosecution is commenced only

when there is "a sufficient factual basis."[45] Moreover, the logic of compulsory prosecution is more compelling in an inquisitorial (rather than adversarial) system of criminal justice. In the inquisitorial system the court itself has substantial factfinding and prosecutorial functions; the "prosecutor" is simply an instrument to commence the process, placing further proceedings in the hands of the investigating magistrate. Restriction of prosecutorial discretion is a necessary facet of a system structured around an inquisitorial magistrate, and is simply an allocation of discretion to the magistrate rather than the prosecutor. It certainly is not, at all events, a discretion-free system. Herrmann, *supra*, at 474-503.

2. *Plea Bargaining.*

Although (unlike federal charging discretion) plea bargaining has not been established by the Constitution itself, it is nevertheless an essential part of our system of criminal justice and has received the approval and encouragement of this Court.[46] *Brady* v. *United States*, 397 U.S. 742, 752-753; *Santobello* v. *New York*, 404 U.S. 257, 260. Like the other forms of discretion present in the criminal justice

[45] Federal Republic of Germany, Code of Criminal Procedure 152(2).

[46] Sometimes, as is apparently the case in *Woodson*, a plea bargain with some defendants is absolutely essential to produce the evidence necessary to convict other participants in the crime. See *State* v. *Woodson*, 215 S.E.2d 607, 616-618. Rational selectivity of this sort cannot operate to invalidate the penalty ultimately imposed.

system and assailed by petitioners, plea bargaining reduces the potential punishment a defendant may suffer; it never operates to increase the maximum punishment. Moreover, unlike other forms of discretion, plea bargaining operates only with the acquiescence (and usually at the behest) of the accused and works to the accused's advantage. Were it otherwise, the accused would not enter into the plea arrangement. It is difficult to understand how this procedure, operating with the permission of the accused and for his benefit, can cause the penalty received by those who do not enter into such bargains to be unconstitutional.

The most difficult question raised by plea bargaining is, petitioners assert, the failure of the prosecutor to enter into such bargains with some defendants, thereby depriving those defendants of an opportunity to escape the death penalty.[47] Perhaps a prosecutor might make such a decision for improper motives; in all probability, if such motives could be shown, the procedure would be vulnerable. Cf. *Littleton* v. *Berbling*, *supra*. But petitioners have not even alleged (let alone adduced proof) that such a practice exists in their states. If a prosecutor were bend-

[47] Only one of petitioners has claimed that he offered to plead guilty to a lesser charge and that this request was refused. Petitioner Waxton offered to plead guilty to armed robbery and to being an accessory after the fact to murder. This offer, coming after all of the evidence at trial had been taken, was apparently declined because the evidence showed overwhelmingly that Waxton had committed the murders personally. See *Woodson* Pet. Br. 11-13.

ing his actions in a forbidden manner, it would at most impugn the acts of the prosecutor, and not be an argument against the constitutionality of all death penalties everywhere. Cf. *United States* v. *Bell*, 506 F.2d 207, 221-222 (C.A.D.C.). And, of course, the failure of a prosecutor to accept a plea arrangement suggested by an accused does no more than cause the accused to stand trial—it is simply a failure to relieve a defendant of the burden properly placed on him by the indictment charging a capital offense. Once a prosecution has begun, its continuation is within the control of the court, and discretion in plea bargaining may then to a limited extent be controlled judicially. See, *e.g.*, *United States* v. *Cowan*, 524 F.2d 504 (C.A. 5); *United States* v. *Ammidown*, 497 F.2d 615 (C.A.D.C.); Fed. R. Crim. P. 11(e). If plea arrangement procedures are so seriously defective the proper cure is their improvement, rather than the invalidation of the death penalty for those who do not enter into such arrangements.

3. *Jury Nullification.*

The power of the jury to acquit despite evidence justifying conviction is a power created and protected by the Constitution itself. The Sixth Amendment confers an unquestioned right to a jury trial (*Duncan* v. *Louisiana*, 391 U.S. 145) and that right, together with the Double Jeopardy Clause of the Fifth Amendment, secures to a jury the power to acquit even those whom some all-knowing observer would say were guilty beyond a reasonable doubt.

The jury's function as the "conscience of the community" (*Witherspoon* v. *Illinois*, *supra*, 391 U.S. at 519) is best served when it considers all of the important facets of the crime, including the culpability of the defendant as well as the fact of his legal guilt. See Scheflin, *Jury Nullification: The Right to Say No*, 45 S. Calif. L. Rev. 168 (1972).

On the other hand, the power of a jury to acquit despite the evidence (or to convict of a lesser included offense although the evidence supports the greater offense) is not an exercise of standardless discretion as was the jury's power to recommend, after conviction, whether a defendant shall be sent to death. The jury's power to nullify is a power, but not an authorization. It is a power because society uses no sanctions to deter it. It is a power because the Constitution allows juries to convict or acquit, and establishes no external standards by which an acquittal may be called "improper;" the fact-finding power is lodged in the jury and when it acquits, what it finds to be "true" *is* true within the boundaries of the legal system. But the power of juries to do these things is not unbridled. There are standards to guide the exercise of that power. The judge carefully instructs the jury on the law, and informs jurors how they should respond to the facts they have found. The jury is told that if they have a particular view of the facts, they should take a specific action. They are not told that if they have found (for example) that the accused committed a killing for hire they may convict of first degree murder, second degree

murder, or acquit; they are told, instead, that they should convict of first degree murder. There are multiple standards to guide the jury's decisions; the jury has "discretion" only in the sense that it has the power to disregard these directions."[48]

The potential vice of jury nullification, even though its availability is created by the Constitution, is that the jury may acquit in an irrational or prejudicial manner. However, the constitutional guarantee of a jury trial rests on the assumption that the jury is not animated by bias, and that the jury is capable responsibly of discharging its duties. If the jury is given to caprice, it would undermine convictions for any crime no less than convictions for capital crimes. But this Court has always assumed that, at least when screened from prejudicial pressures and from legally inadmissible but "powerfully incriminating extrajudicial statements" (*Bruton* v. *United States*, 391 U.S. 123, 135), the jury can be trusted to decide the controversy reasonably, conscientiously, and intelligently. See *McGautha, supra.* Cf. *Duncan* v. *Louisiana, supra,* 391 U.S. at 157.

The argument that juries will act unfairly and arbitrarily assumes that, on this most serious decision, twelve jurors who have been carefully screened by defense counsel will silently cast their votes for

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[48] If the instructions given to the jury are vague or defective, the proper recourse is either a claim that the statutes defining the crimes are unconstitutionally vague (see pages 72-73, *supra*) or a claim of simple error in framing the charge.

private reasons without reference to the commands of the law. The available evidence is to the contrary. Professors Harry Kalven, Jr. and Hans Zeisel, in preparing their massive study *The American Jury* (1966), analyzed in depth the workings of more than 3,500 jury trials, and concluded that in the great majority of cases in which the jury declined to convict (whether or not of a capital offense) when the evidence apparently was persuasive, the jury was making a reasoned and reasonable response to the excessiveness of a penalty in light of the nature of the crime and the circumstances of the defendant. The authors uncovered no evidence that the jury was behaving capriciously in these instances of "nullification" (*id.* at 306-312).

We submit that there is simply no evidence that the jury, when deciding whether to convict in capital cases, acts in a wanton or freakish or discriminatory manner. The jury is fulfilling a function given to it by the Constitution itself; more is needed than petitioners' groundless speculation that the jury might act irrationally to demonstrate that the Constitution's guarantee of trial by jury is a bar to the imposition of capital punishment.

4. *Lesser Included Offenses.*

Most of the arguments we have made above with respect to juries also apply to the function of juries as they consider conviction for lesser included offenses. There is no evidence that juries act in a freakish manner; petitioners' assertion of the poten-

tial for such action does not establish that such arbitrary behavior occurs.

Moreover, the Sixth Amendment's right to trial by jury includes within it a constitutional right to have the jury consider any lesser included offenses to the major charge. When the defendant controverts any element of the charge (and defendant's assertion, if correct, would entitle him to conviction on a lesser charge) he is entitled to have that charge put to the jury so that it can exercise its constitutional fact-finding function. *Berra* v. *United States*, 351 U.S. 131, 134; *Stevenson* v. *United States*, 162 U.S. 313. This does not mean, of course, that a defendant is required to accept such a charge; he or she is entitled to submit the case to the jury on the counts of the indictment in the expectation (or hope) of a complete acquittal. And, under federal law, a defendant is not entitled to a lesser included offense instruction unless there is some evidence that would support conviction of that charge.[49] *United States* v. *Bishop*, 412 U.S. 346, 361; *Sansone* v. *United States*, 380 U.S. 343, 350.

There is thus no evidence that juries use their ability to convict of a lesser included offense in a capricious manner. Their ability to convict of a lesser

[49] Some petitioners contend that in their states a lesser included offense instruction may be given even though there is no evidence to support the lesser offense. However, we do not consider this further because it does not apply to the federal system and is not, in any event, an avenue of inherent or inescapable discretion. If it is excessively standardless, it may be assailed directly in an appropriate case.

included offense is in any event created by the Sixth Amendment itself. Petitioners' claim regarding the opportunity for discretion does not make capital punishment invariably cruel and unusual.

5. *Jury Discretion at the Punishment Phase.*

Petitioners Gregg, Jurek and Proffitt were sentenced to death under statutes allowing the judge and jury to exercise some controlled discretion in selecting the punishment appropriate for those convicted of capital crimes. The Antihijacking Act of 1974 (App. C, *infra*) also allows the jury to exercise some discretion. The Antihijacking Act provides that if death results from a hijacking, and if the defendant is convicted of the crime, the factfinder then must consider the penalty to be imposed. Capital punishment is permissible only if the prosecution can prove by a preponderance of the evidence that one of five aggravating factors is present. These factors include: that the defendant previously had been convicted of any crime for which a sentence of life imprisonment or death was imposable, that the defendant previously had been convicted of two felonies involving the infliction of serious bodily injury, that the defendant knowingly created a grave risk of death to at least one person in addition to the person who died, or that the defendant committed the crime in "an especially heinous, cruel, or depraved manner." If the factfinder explicitly determines that one of the aggravating circumstances existed, the defendant must be sentenced to death un-

less the factfinder also determines that a mitigating circumstance exists. The five enumerated mitigating circumstances are: that the defendant was under the age of 18 when he committed the crime, that the defendant's capacity to appreciate the wrongfulness of his conduct was substantially impaired, that the defendant was under substantial duress, that the defendant's participation in a crime primarily committed by another was relatively minor, or that the defendant could not reasonably have foreseen that his conduct would create a grave risk of causing the death of the victim. If the factfinder explicitly determines that one of these mitigating circumstances existed, the defendant must be sentenced to life imprisonment.[50]

There is nothing in the idea of discretion concerning the penalty to be imposed that renders capital

[50] The discretion conferred upon the factfinder by the Antihijacking Act is significantly less than that conferred by the three state statutes before the Court. The Florida statute, which is perhaps most similar to the Antihijacking Act, allows a jury to "balance" aggravating and mitigating factors and allows it to recommend a sentence of death even when it finds a mitigating factor. It does not require explicit findings on the presence of absence of each factor. The judge is free to rebalance the factors and to disregard the jury's recommendation. The Georgia statute allows the death penalty to be imposed only if the jury finds at least one aggravating factor, but it grants the jury complete discretion to recommend mercy, and so to prevent execution. The Texas statute permits the imposition of the death penalty only if three very broadly-worded conditions are satisfied; a jury would have substantial discretion to determine the existence of these conditions.

punishment unconstitutional. This Court already has upheld, as consistent with the Constitution, state statutes that vest absolute discretion in the jury. It wrote: "In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution." *McGautha* v. *California*, *supra*, 402 U.S. at 207 (footnote omitted). If absolute discretion is permissible under the Constitution, *a fortiori* discretion that has been structured and confined by statutory standards is consistent with the Constitution.

There is no reason to believe that judges and juries will exercise the discretion thus conferred upon them in arbitrary or freakish ways. Kalven and Zeisel studied the experience under laws committing the decision to the complete discretion of the jury and concluded that when either the judge or the jury had available both a capital disposition and a noncapital disposition [51] they agreed in a remarkable number of cases—81 percent. This indicates that standards are at work behind the decisions. In those cases in which there was disagreement Professors Kalven and Zeisel could find a rational basis for that disagreement in all but two cases. Kalven & Zeisel, *The American Jury* 445 (1966). Perhaps most signifi-

[51] Whether because the jury could determine the sentence or because a jury could convict of a noncapital lesser included offense.

cantly, a clear pattern of aggravation of the worst sort marked those cases in which judge and jury agreed that the death penalty was appropriate.

> The cases in which jury and judge agree that the defendant should pay for his crime with his life are marked for the most part by peculiar heinousness. In many, a clear pattern emerges; there is an aspect of almost gratuitous violence. [*Id.* at 437.]

The other major study of the workings of the modern jury system was conducted by the Standford Law Review. See Note, *A Study of the California Penalty Jury in First-Degree-Murder Cases: Standardless Sentencing*, 21 Stan. L. Rev. 1297 (1969). That study, which confined its attention to the penalty phase of sentencing by juries that had convicted the defendant, establishes that the jury makes rational and consistent penalty decisions even in the absence of standards. The authors of the study analyzed 178 separate variables that might have entered into the penalty decision in each of the 238 cases studied. The results, apparently to the surprise of the student editors, showed that there are "definite patterns of jury decisionmaking, precluding the possibility that juries make their decisions wholly at random" (*id.* at 1419). The editors concluded that even without standards presented by the judge, the California juries reached conclusions astonishingly similar to those that would have been produced by an "objective" observer applying the aggravating/mitigating criteria proposed by the Model Penal Code

(*id.* at 1429). This study, like the work of Kalven and Zeisel, demonstrates the propriety of this Court's conclusion in *McGautha* v. *California*, *supra*, 402 U.S. at 207-208, that "[t]he States are entitled to assume that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision" and that, with or without formal standards, juries consider the appropriate criteria.

Although we therefore believe that the standardless discretion approved by this Court in *McGautha* satisfies all constitutional requirements, it also should be clear that the standards contained in the Antihijacking Act and the state statutes under review provide substantial uniformity in decisionmaking and alleviate any remaining concerns about arbitrariness. Petitioners argue that the standards contained in these statutes are meaningless and that the results their application produces are "freakish." But the entire corpus of the criminal law and administrative law is based upon the premise that rules and standards do make a difference, indeed a vital difference, in many cases. See generally K.C. Davis, *Discretionary Justice: A Preliminary Inquiry* (1969). Standards may not eliminate discretion, but they "canalize [it] within banks that keep it from overflowing." *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 551 (Cardozo, J., concurring). The varieties of human experience allow no more, and the Constitution requires no more.

It follows that it makes little constitutional difference whether the factors articulated for the jury's consideration are quite specific (as they are in the federal Antihijacking Act) or are more general (as they are under the Texas statute). But to the extent the degree of generality of the standards is important, the importance relates to the requirements of the Due Process Clause, not to the Eighth Amendment. Petitioners Gregg, Jurek and Proffitt are in effect contending that the standards used in their cases are unconstitutionally vague. But vagueness can be cured by judicial construction or by legislative amendment of defective statutes. Excessively vague statutes can be invalidated without impugning the legislative prerogative to prescribe capital punishment under suitably clear statutes.[52]

Moreover, even if a vagueness challenge to the Georgia, Texas and Florida statutes can be maintained, it "is well established that [such] challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." *United States* v. *Mazurie*, 419 U.S. 544, 550. A statute is not unconstitutional merely because it may be uncertain in some applications or because it deals with matters of degree. "[T]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury

[52] That is the course followed by the Supreme Court of Illinois, which struck down a post-*Furman* statute on the grounds that it was too vague and that it had created a "new court" in violation of the Illinois constitution. *People ex rel. Rice* v. *Cunningham*, 336 N.E.2d 1.

subsequently estimates it, some matter of degree." *Nash* v. *United States*, 229 U.S. 373, 377. The statute can be unconstitutional only if its words describe "no comprehensible course of conduct at all." *United States* v. *Powell*, No. 74-884, decided December 2, 1975, slip op. 5. That is hardly the case here, for such descriptions of human conduct as "deliberately and with the reasonable expectation that the death of the deceased or another would result" and "whether the conduct * * * was unreasonable in response to the provocation," [53] of which petitioner Jurek complains, and similar phrases in the other state statutes, are the staples of the criminal law. They are no less precise than the statutes upheld in *Powell*, *Mazurie*, *Nash* and innumerable other decisions by this Court.[54]

[53] Vernon's Texas Code of Crim. Pro., Art. 37.071(b) (1974).

[54] See, *e.g.*, *United States* v. *National Dairy Products Corp.*, 372 U.S. 29 ("unreasonably low prices"); *United States* v. *Korpan*, 354 U.S. 271, 273, n.2 ("coin operated amusement or gaming device"); *Boyce Motor Lines* v. *United States*, 342 U.S. 337 ("so far as practicable, * * * driving into or through congested thoroughfares"); *Robinson* v. *United States*, 324 U.S. 282 ("liberated unharmed" in kidnapping statute); *United States* v. *Gaskin*, 320 U.S. 527 ("condition of peonage"); *United States* v. *Ragen*, 314 U.S. 513, 517 ("reasonable allowance for salaries"); *Sproles* v. *Binford*, 286 U.S. 374 ("shortest practicable route"); *United States* v. *Alford*, 274 U.S. 264 ("in or near any forest, timber, or other inflammable material"); *Miller* v. *Oregon*, 273 U.S. 657 (explained at 274 U.S. 464-465) (drive a vehicle in "a careful and prudent manner"); *Omaechevarria* v. *Idaho*, 246 U.S. 343, 345, n.3 (any range "usually occupied by any cattle grower").

6. *Clemency.*

We return here to a now familiar theme. At least in the federal system the President's ability to pardon or grant clemency on such terms as he thinks fit is established by the Constitution itself, and thus shielded from legislative or judicial constraint. *Ex parte Garland*, 4 Wall. 333, 380; *Schick* v. *Reed*, 419 U.S. 256. As Hamilton explained in the 74th *Federalist*:

> Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel. [p. 473 (Wright ed. 1961).]

In *Schick* this Court concluded that the pardoning power of the President flows from the Constitution alone and therefore may be exercised by him at his will without regard to a need for consistency of decision. "The very essence of the pardoning power is to treat each case individually" (419 U.S. at 265). "Individual acts of clemency inherently call for discriminating choices because no two cases are the same" (*id.* at 268). Because the executive power to grant clemency is unfettered and unfetterable, it cannot logically follow that it is unconstitutional to treat in accordance with a court's judgment those whom the executive declines to pardon.

D. All Discretion Taken Together Does Not Prevent the Death Sentence From Being Validly Imposed

The net effect of the instances of discretion in the criminal justice system is no greater than the sum of its parts. Petitioners' argument is that the Constitution affirmatively provides (or at least permits) so many avenues of escape from death, so many rights the defendant can invoke, and so many opportunities for mercy, each designed expressly to shield an accused from unjust conviction or punishment, that only an arbitrarily or freakishly selected few of those who "really deserve" death escape the net of safeguards against injustice. Then, the argument concludes, it must be unjust to punish those remaining who have not been spared, even though they deserve their fate.

The Constitution does not impose this incredible result on the criminal justice system. Those whose execution is not averted by one of the avenues of discretionary mercy or constitutional safeguard have been sent to their death because none of a large number of actors thought they deserved to be spared. Such a procedure is the opposite of arbitrariness. It is instead a decision by consensus—only by unanimous agreement of the grand jury, the prosecutor, the judge, the jury (itself unanimous), and the clemency authority may death be imposed.[55] There

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[55] In the Due Process Clause the framers ensured that the risk of the execution of an innocent man would be held to a minimum. Because the framers themselves authorized capital punishment (1 Stat. 112) and because, as we have argued, the Eighth Amendment does not forbid that type of punishment

is nothing in the Eighth Amendment (or in the Due Process Clause) that precludes such action by consensus. And there is no justification for reaching a conclusion that the combination of provisions, each of constitutional origin, granting discretion to a number of actors, inevitably renders the criminal justice system incapable of producing a constitutional sentence.

In the last analysis petitioners are seeking to convince this Court that the Eighth Amendment cannot coexist with the Fifth and Sixth Amendments, because procedures either compelled or permitted by those amendments, and by other provisions of the Constitution, invariably produce a result intolerable under the Eighth Amendment. But the Constitution is not an instrument so inconsistent within itself that the commands of one amendment nullify the commands of others.

When each step in the process is constitutionally permitted, indeed in many instances compelled, when all that the Constitution required to be done was

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for crime, the framers expressed their belief that the benefits of capital punishment—including protecting the lives of innocent people by deterring murders—outweigh whatever very slight risk there may be of an unwarranted execution. This Court has scrutinized capital cases carefully in order further to minimize that risk. The safeguards and avenues of discretionary mercy we have discussed in this part of the brief stand as a bulwark against the possibility of error that could produce an unjustified execution and, because of the evolution of stronger safeguards in the criminal justice system, it is much less likely today than it was at the time of the framers that such errors will be made.

done, when nevertheless the resulting penalty, although not of a type forbidden, is then claimed to be unconstitutional *because* of the process followed in imposing it—in short, when the foundation of petitioners' argument is exposed, the conclusion built upon it must fall. The course chosen by at least 35 states and the United States since *Furman* should not be nullified by this Court.

CONCLUSION

The United States submits that capital punishment is not *per se* unconstitutional.

Respectfully submitted.

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APPENDIX A

Petitioner in *Fowler* relied (Pet. Br. 136, n. 226) upon what he asserted are "discrete and limited but careful studies" demonstrating racial discrimination in the imposition of capital punishment. Petitioner Jurek joins this assertion and relies upon one additional study (*Jurek* Pet. Br. 81-84, nn. 146-147). Petitioner Roberts, although not relying upon the authorities cited in *Fowler*, also contends that there is racial discrimination (*Roberts* Pet. Br. 69).

Most of the studies relied upon reflect experience in southern states during a time when blacks often were excluded from grand and petit juries. Whatever force they may have is diminished by this simple fact. One study finds racial discrimination in rape cases alone. And one study relied upon by petitioners finds *no* evidence of racial discrimination. We examine the studies below.

1. Johnson, *The Negro and Crime*, 217 Annals 93 (1941). Johnson studied the imposition of death sentences in Richmond, Virginia between 1930 and 1939, five counties in North Carolina between 1930 and 1940, and Fulton County, Georgia between February 1938 and September 1939. The Georgia study was fruitless because of insufficient data. In Richmond only one sentence of death was imposed—on a white man. In the North Carolina sample 218 blacks were convicted of murder and 17 (or 7.8%) of them were sentenced to death; 44 whites were convicted of murder and 8 (or 18%) of them were sentenced to death. Of those convicted, whites were therefore

more likely to be sentenced to death than blacks. Of those sentenced to death, 71.6% of the blacks and 69% of the whites were executed; the difference is not statistically significant. Although blacks appeared to be convicted more often than whites, it was not possible within the scope of the study to determine whether this difference was attributable to race, to the nature and frequency of crimes committed, or to other factors. Johnson himself observed that his data were not conclusive.

2. Garfinkel, *Research Note on Inter- and Intra-Racial Homicides*, 27 Social Forces 369 (1949). Garfinkel collected data from 10 counties in North Carolina between 1930 and 1940. The study attempted to detect any difference in the penalty assessed for inter-racial murders as opposed to that assessed for intra-racial murders. His data cut two ways: a white convicted of murdering one of his own race was *more* likely (18.6%) than a black convicted of murdering one of his own race (6.7%) to be sentenced to death, while a black convicted of murdering a white was more likely (42.9%) to be sentenced to death than was a white convicted of murdering a black (0%). The net effect of this is unclear, and Garfinkel declined to engage in "sheer speculation" about it (27 Social Forces at 381).

3. Johnson, *Selective Factors in Capital Punishment*, 36 Social Forces 165 (1957). This is not a "study" at all, but simply is a listing of the persons convicted of capital offenses in North Carolina since 1909. The author asserts that race is an important

factor because 73.8% of those sentenced to death are black. He acknowledges, however, that this phenomeon could as easily be explained by differences in the rate in which individuals commit capital crimes (blacks in North Carolina were more likely to be poor, and the poor are more likely to commit violent offenses). Johnson observes that the more recent figures (the 1950s, in his study) reveal a narrowing in the difference between the rate at which the races are sentenced to death.

4. Wolfgang, Kelly & Nolde, *Comparison of the Executed and the Commuted Among Admissions to Death Row*, 53 J. Crim. L. Crim. & Police Sci. 301 (1962). This study concludes that the death sentences of whites are slightly more likely to be commuted than are the sentences of blacks. [This is inconsistent with the results reported in the Johnson study at 217 Annals, *supra.*] However, the authors did not assess the effect of prior criminal record upon the commutation rate, and, if Bedau's study (*infra*) is correct, many apparently racial differences can be explained by differences in the number of prior criminal convictions of those sentenced to death. The authors concede that "too many unknown or presently immeasurable factors prevent our making definitive statements about the relationship" between race and execution rates.

5. Bedau, *Death Sentences in New Jersey 1907-1960*, 19 Rutgers L. Rev. 1 (1964). Bedau analyzed the death sentence in New Jersey using data from 1907 to 1960. He concluded: (1) Because data

establish that blacks commit three to six times as many capital crimes per individual as do whites, no discrimination would be established unless (in New Jersey) more than 65% of all those executed were black. The actual rate of black executions was discovered to be less than this, and, consequently, discrimination was not proved. (2) The only arguable evidence of discrimination was the fact that 17.7% of the whites sentenced to death had their sentences commuted, while only 8.1% of the blacks so sentenced were granted a commutation. Bedau also found, however that this difference becomes statistically insignificant if past criminal record of the offender is accounted for. The author concludes: "No evidence has been found, and no inferences have been drawn from the facts as reported in the course of this study that racial prejudice in the courts or commutation authority has been a proximate cause of the evident differential treatment accorded nonwhites under sentence of death" (19 Rutgers L. Rev. at 53).

6. Wolfgang and Reidel, *Race, Jury Discretion, and the Death Penalty*, 407 Annals 119 (1973). The authors report on a comprehensive study, sponsored by the NAACP, of rape convictions in 11 southern states between 1945 and 1965. The data revealed that among all those convicted of rape, blacks were selected disproportionately for the death sentence. Thirteen percent of all blacks convicted of rape were sentenced to death; two percent of all whites convicted were so sentenced. The study carefully isolated the effects of the age and prior record of the offender, and of numerous characteristics of the victim, offense, and trial. Even after controlling for these effects a substantial portion of the disparity in sentencing was attributable to race. This is a careful and comprehensive study, and we do not question its conclusion that during the 20 years in question, in southern states, there was discrimination in rape cases. See also Wolfgang, *Racial Discrimination in the Death Sentence for Rape*, in *Executions in America* 114 (Bowers ed. 1974) (reporting on the same research). The research does not provide support for a conclusion that racial discrimination continues, however, or that it applies to murder cases.

7. Petitioner Roberts refers (*Roberts* Pet. Br. 69) to Professor Wolfgang's assertion that "[t]he evidence of racial discrimination in capital punishment in twentieth century America is * * * hardly contestable." Wolfgang, *Racial Discrimination in the Death Sentence for Rape*, in *Executions in America* 114, 117 (Bowers ed. 1974). As we have indicated above, the evidence upon which Professor Wolfgang relies relates to rape cases in the south during a period when blacks often were excluded from grand and petit juries. To the extent the assertion is meant to have a broader meaning, it is a statement exceeding the scope of the study.

8. Some have cited Koeninger, *Capital Punishment in Texas, 1924-1968* 123 (1969), as a study demonstrating that capital punishment is imposed

discriminatorily. Koeninger obtained the available records on 483 Texas cases. He observed that blacks are sentenced to death in disproportionate numbers, and concluded that this indicates racial discrimination. He made no attempt to discover whether this disparity could have been caused by differences in the rate at which capital crimes are committed, and he did not attempt to control for the effects of other variables, such as prior record of the offenders. This study therefore is an inference of discrimination directly from the fact that approximately half of those executed are black. For the reasons we discuss in the text at pages 66-68, *supra*, inferences of this sort are meaningless. A similar problem infects the conclusions of those authors who have inferred discrimination directly from the reported execution data without performing any independent studies. See Alexander, *The Abolition of Capital Punishment*, Proceedings of the 96th Congress of Correction of the American Correctional Association, Baltimore, Maryland 57, 59 (1966); Williams, *The Death Penalty and the Negro*, 67 The Crisis 501 (1960); Hartung, *Trends in the Use of Capital Punishment*, 284 Annals 8, 14-17 (1952); Hockhammer, *The Capital Punishment Controversy*, 60 J. Crim. L. Crim. & Police Sci. 360, 362 (1969).

9. Petitioner Jurek relies upon the assertion of petitioner Fowler (*Fowler* Pet. Br. 136, n. 226) that "it has *seemed apparent* to responsible commissions and individuals studying the administration of the death penalty in this country [that there is discrimination on account of race.]" The responsible individuals to whom this "seemed apparent" conducted no independent research; each of the authorities relied upon what is apparently the received wisdom that discrimination exists. See The President's Commission on Law Enforcement and the Administration of Justice, *The Challenge of Crime in A Free Society* 143 (1967); Clark, *Crime in America* 335 (1970). But, as the discussion of the statistical studies cited by petitioners should make clear, the received wisdom is not supported by the data and is open to serious question. The most recent (and most sophisticated) study found no evidence of discrimination in murder cases. Note, *A Study of the California Penalty Jury in First-Degree-Murder Cases: Standardless Sentencing*, 21 Stan. L. Rev. 1297, 1346, 1366-1367, 1417-1420 (1969). See also the data collected in respondent's brief in *Aikens* v. *California*, No. 68-5027, October Term, 1971, pages 105-108, which demonstrates that although blacks received 18.6% of the death sentences in California, they were the beneficiaries of 25% of the commutations.

After summarizing most of the studies conducted through 1973, Professor Bowers, an opponent of capital punishment, concluded (Bowers, *Executions in America* 74-75 (1974)): "There are obvious shortcomings in the body of research. The studies are regionally and historically selective. Most states with the death penalty have not been included in any of these investigations * * *. Furthermore, * * * most have failed to test the independence of the racial differences they have uncovered." We agree with this

assessment. But we also agree with Hockhammer, *supra*, 60 J. Crim. L. Crim. & Police Sci. at 362, that even if discrimination were proven, "it would be a mistake to argue that capital punishment should be rejected because some discrimination exists. The proper approach is to remedy the defect, not abolish the system."

APPENDIX B

Petitioners contend that Professor Ehrlich's study of the deterrent effect of capital punishment is open to criticism and consequently should be disregarded by the Court. For the reasons we discuss in the text, we believe that legislatures rather than courts must evaluate the technical merits of empirical studies. We have included this brief discussion of the merits of the debate between Professor Ehrlich and his critics only because of the vehemence of the assault upon his conclusions.

Petitioners have provided the Court with two technical discussions of Ehrlich's work (*Jurek* Pet. Br. App. 2, Sub-apps. C and E). The first is unsigned and the second is an unpublished paper by Passell and Taylor, *The Deterrent Effect of Capital Punishment: Another View* (hereafter Passell & Taylor). Two other criticisms of Ehrlich's work have been published. See Baldus and Cole, *A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment*, 85 Yale L.J. 170 (1975) (hereafter Baldus & Cole); Bowers and Pierce, *The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment*, 85 Yale L.J. 187 (1975) (hereafter Bowers & Pierce). Both of these articles conclude that Ehrlich has overestimated the deterrent effects of capital punishment. Ehrlich's work also has been criticized by Yunker, *The Deterrent Effect of Capital Punishment: Comment* (hereafter Yunker), which concludes that errors in Ehrlich's study produce a five-fold underestimation in the

deterrent effect. Ehrlich has responded to most of these criticisms in Ehrlich, *Deterrence: Evidence and Inference*, 85 Yale L.J. 209 (1975) (hereafter Ehrlich's reply). Jon K. Peck, an assistant professor of economics at Yale, agrees in part with Ehrlich and in part with his critics. Peck, *The Deterrent Effect of Capital Punishment: Ehrlich and His Critics*, 85 Yale L.J. 359 (1976) (hereafter Peck).

Ehrlich's critics have made four major arguments that, they contend, undercut the force of his conclusions. First, they argue that multiple regression analysis is unreliable. Second, they contend that Ehrlich used deficient data. Third, they believe that Ehrlich should not have included the post-1960 years in his study. Finally, they challenge Ehrlich's use of a logarithmic specification for some of his equations. We discuss these arguments in turn.

1. Petitioners contend (*Jurek* Pet. Br. App. 2, Sub-app. C) that Professor Ehrlich's conclusions should be disregarded because "regression analysis is an exceptionally brittle tool of limited usefulness if conditions make it impossible to validate regression results with controlled experimentation" (*id.* at 2-44; footnote omitted). It is not possible to perform "controlled experimentation" on the death penalty; therefore, the argument concludes, regression analysis is "especially dangerous" (*ibid.*). See also Baldus & Cole.

We do not dispute the observation that linear regression analysis is quite sensitive to the identification of the potentially explaining factors that are

thought to be the independent variables and to the specification of the mathematical relationship among them. Great care must be taken both to identify all of the relevant variables (in this case, all of the potential causes of a change in the murder rate) and to ensure that the apparently "independent" variables explain the dependent variable (murder) rather than each other. It is often difficult to achieve a certain explanation in the absence of "experimental" evidence, because only with a number of test sets of data to explore is it possible to reject with complete confidence a spurious covariance between the observed changes in the independent and dependent variables.

It is sometimes possible, however, to verify regression results by using the same specification to attempt to explain subsets of the available data. Professor Ehrlich has done so and reports that these results confirm his original findings. Ehrlich's reply, 85 Yale L.J. at 217. Bowers & Pierce applied Ehrlich's method to a slightly different data base and obtained results similar to Ehrlich's, also confirming Ehrlich's original findings. Bowers & Pierce, 85 Yale L.J. at 196; Ehrlich's reply, 85 Yale L.J. at 210.

Moreover, in evaluating the weight to be given to findings of linear regression analysis, it is necessary to consider not only the pitfalls of the linear regression but also the defects of alternative methods. All things considered, it is the consensus of statisticians and econometricians that regression analysis is the most powerful statistical tool available for testing

and evaluating competing explanations of observed variance in specific events. See generally Wonnacott and Wonnacott, *Econometrics* 1-9 (1972); Eaton, *Multivariate Statistical Analysis* (1972); Snedecor and Cochran, *Statistical Methods* (6th ed. 1967); Ezekiel and Fox, *Methods of Correlation and Regression Analysis* (3d ed. 1959); Draper and Smith, *Applied Regression Analysis* (1966). It is the statistical method of choice whenever there are enough observations to make its use feasible. See also Finkelstein, *Regression Models in Administrative Proceedings*, 86 Harv. L. Rev. 1442 (1973); Note, *Beyond the Prima Facie Case in Employment Discrimination Law: Statistical Proof and Rebuttal*, 89 Harv. L. Rev. 387 (1975) (collecting cases).

Alternative methods, such as the "matched pairs of states" method advocated by Sellin, produce results that are completely unreliable. See the analysis of these methods at pages 39-43 of our brief. See also Ehrlich's reply, 85 Yale L.J. at 222-224; Peck, 85 Yale L.J. at 364-365 ("The matching approach has its own set of difficulties. It imposes relatively little explicit structure on the problem and is perhaps less likely than the econometric approach to find effects which are weak. The fundamental problem, however, is that the data are not generated in a controlled experiment. In making matched pairwise comparisons, the choice of pairs is inevitably subjective. * * * Even if states are correctly matched in terms of the averages of all relevant variables, other differences may be important. For example, of two states with

the same average permanent income, one may have a much greater proportion of low income families than the other. If low income families were disproportionately responsible for homicides, the pairing of the two would be inappropriate. * * * A final difficulty is the possible response of punishment policies to homicide rates. For example, if high or rising homicide rates led states to institute the death penalty and low or declining rates led states to abolish the penalty, retentionist states would tend to have higher homicide rates. * * * The paired-comparison approach cannot adequately separate [all of the competing] effects, and consequently could fail to yield evidence of an underlying deterrent relationship."). Only regression analysis is capable of isolating the effects of a large number of variables, all of which may make some contribution to the murder rate. Only after that has been done is it possible to determine what role the death penalty plays in influencing the number of serious crimes. Regression analysis must be used with care, but it, unlike the paired-state method, is at least capable of providing a meaningful answer if properly applied.

2. Bowers & Pierce (and, to some extent, the other critics) argue that Ehrlich has used inadequate data, and therefore that his results are open to question. They point out that the early years of data collected by the Uniform Crime Reporting System are not accurate (Bowers & Pierce, 85 Yale L.J. at 187-192).

This criticism is, to a point, well taken. The data from the 1930s and 1940s are not entirely reliable,

as the Uniform Crime Reports expressly concede. But this argument also discredits the earlier studies that do not find a deterrent effect. Although many of those studies relied upon data sources other than the Uniform Crime Reporting System, those sources, too, are not fully accurate. In addition, reliance on them would lead to errors of a different sort. The Census Bureau Vital Statistics data, for exemple, aggregates all homicides, while the Uniform Code data separates willful felonious homicides (which are likely to be capital crimes) from negligent manslaughters (which are not). See generally Ehrlich's reply, 85 Yale L.J. at 212-214. What is more, any random errors in the data from the 1930s and 1940s would, in all likelihood, produce an underestimation in the deterrent value of capital punishment. See Ehrlich's reply, 85 Yale L.J. at 213; Peck, 85 Yale L.J. at 366; Ehrlich, *Rejoinder*, 85 Yale L.J. 368 (1976).

3. Passell & Taylor and Bowers & Pierce contend that Ehrlich should not have included the post-1960 years in his observations. They argue that if those years are deleted from the study the estimated deterrent effect disappears; they suggest that whenever a regression analysis spans a large number of years, there is a risk that social changes during those years will affect the relationship among the variables, so that the factors explaining murder committed at the beginning of the period will not do so (or will do so in a different way) at the end of the period.

This argument is not without its force. Yunker, too, argues that social changes in the 1950s make a

continuous analysis inappropriate. But, as Yunker points out, if the 1960s are studied in isolation, a rapid decrease in the number of executions actually carried out is associated with a rapid increase in the murder rate. A study of that period alone led Yunker to conclude that each execution may have deterred 50 murders.

As Peck indicates (85 Yale L.J. at 367, n. 27) Ehrlich probably would disagree with Yunker, just as he has disagreed with Sellin and with Bowers & Pierce. Ehrlich has argued that the inclusion of the 1960s in his study was necessary for two reasons: to obtain a sample of executions and murders of sufficient size that a statistical study yields reliable results, and to include a number of years when the execution rate was changing rapidly. Ehrlich's reply, 85 Yale L.J. at 214-217. Because the execution and murder rates were either stable or changing only slowly in the 1930s and 1940s, a regression performed upon those decades alone would not have been reliable.

There are alternative explanations for the sudden surge in the number of murders in the 1960s. In one explanation, favored by Ehrlich and Yunker, the decrease in the number of executions plays some role. In the other, favored by Bowers & Pierce, changes in other social factors are so extensive they alone produce the increase. Professor Peck believes that we cannot know who is right until studies are performed on "disaggregated" data—studies for individual states, for particular spans of years different from those used by Ehrlich, and so on. Those studies are now under way.

4. Ehrlich used a logarithmic format for some of his calculations. Baldus & Cole, Bowers & Pierce, and Passell & Taylor all contend that if Ehrlich had used natural numbers his analysis would not have demonstrated a deterrent effect for the death penalty. This is primarily so, the critics explain, because in a logarithmic format the effect of reducing the execution rate close to zero in some years is given a disproportionate weight. Passell & Taylor attempted to duplicate Ehrlich's results with natural numbers and found no observable deterrent.

On the other hand, Yunker used natural numbers and estimated a deterrent effect much larger than that estimated by Ehrlich. Ehrlich himself contends (Ehrlich's reply, 85 Yale L.J. at 217-219) that use of the logarithmic format was preferable for various reasons too technical to be explained here; moreover, he argues, he has performed regressions using natural numbers and has observed a deterrent effect. He attributes the contrary conclusions of Bowers & Pierce, and of Passell & Taylor, to basic statistical errors. Ehrlich's reply, 85 Yale L.J. at 219-221, 225, n. 48. Peck agrees with Ehrlich that his critics have committed basic statistical errors (Peck, 85 Yale L.J. at 367) and observes that neither the logarithmic form nor the natural number form "is likely to be exactly right, but only an approximately correct shape for the function is needed" (*id.* at 361). Once more, Peck suggests that additional work is necessary before we can know whether Ehrlich or his critics have the better of the argument.

APPENDIX C

The Antihijacking Act of 1974, Pub. L. 93-366, 88 Stat. 409, 410-413, amending 49 U.S.C. (Supp. IV) 1472 and 1473, provides in relevant part:

Section 1472:

* * * * *

(i) Aircraft piracy.

(1) Whoever commits or attempts to commit aircraft piracy, as herein defined, shall be punished—

(A) by imprisonment for not less than 20 years; or

(B) if the death of another person results from the commission or attempted commission of the offense, by death or by imprisonment for life.

(2) As used in this subsection, the term "aircraft piracy" means any seizure or exercise of control, by force or violence or threat of force or violence, or by any other form of intimidation, and with wrongful intent, of an aircraft within the special aircraft jurisdiction of the United States.

(3) An attempt to commit aircraft piracy shall be within the special aircraft jurisdiction of the United States even though the aircraft is not in flight at the time of such attempt if the aircraft would have been within the special aircraft jurisdiction of the United States had the offense of aircraft piracy been completed.

* * * * *

(n) Aircraft piracy outside special aircraft jurisdiction of the United States.

(1) Whoever aboard an aircraft in flight outside the special aircraft jurisdiction of the United States commits "an offense", as defined in the Convention for the Suppression of Unlawful Seizure of Aircraft, and is afterward found in the United States shall be punished—

(A) by imprisonment for not less than 20 years; or

(B) if the death of another person results from the commission or attempted commission of the offense, by death or by imprisonment for life.

(2) A person commits "an offense", as defined in the Convention for the Suppression of Unlawful Seizure of Aircraft when, while aboard an aircraft in flight, he—

(A) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act; or

(B) is an accomplice of a person who performs or attempts to perform any such act.

(3) This subsection shall only be applicable if the place of takeoff or the place of actual landing of the aircraft on board which the offense, as defined in paragraph (2) of this subsection, is committed is situated outside the territory of the State of registration of that aircraft.

(4) For purposes of this subsection an aircraft is considered to be in flight from the mo-

ment when all the external doors are closed following embarkation until the moment when one such door is opened for disembarkation, or in the case of a forced landing, until the competent authorities take over responsibility for the aircraft and for the persons and property aboard.

* * * * *

Section 1473:

* * * * *

(c)(1) A person shall be subjected to the penalty of death for any offense prohibited by section 1472(i) or 1472(n) of this title only if a hearing is held in accordance with this subsection.

(2) When a defendant is found guilty of or pleads guilty to an offense under section 1472 (i) or 1472(n) of this title for which one of the sentences provided is death, the judge who presided at the trial or before whom the guilty plea was entered shall conduct a separate sentencing hearing to determine the existence or nonexistence of the factors set forth in paragraphs (6) and (7), for the purpose of determining the sentence to be imposed. The hearing shall not be held if the Government stipulates that none of the aggravating factors set forth in paragraph (7) exists or that one or more of the mitigating factors set forth in paragraph (6) exists. The hearings shall be conducted—

(A) before the jury which determined the defendant's guilt;

(B) before a jury impaneled for the purpose of the hearing if—

(i) the defendant was convicted upon a plea of guilty;

(ii) the defendant was convicted after a trial before the court sitting without a jury; or

(iii) the jury which determined the defendant's guilt has been discharged by the court for good cause; or

(C) before the court alone, upon the motion of the defendant and with the approval of the court and of the Government.

(3) In the sentencing hearing the court shall disclose to the defendant or his counsel all material contained in any presentence report, if one has been prepared, except such material as the court determines is required to be withheld for the protection of human life or for the protection of the national security. Any presentence information withheld from the defendant shall not be considered in determining the existence or the nonexistence of the factors set forth in paragraph (6) or (7). Any information relevant to any of the mitigating factors set forth in paragraph (6) may be presented by either the Government or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials; but the admissibility of information relevant to any of the aggravating factors set forth in paragraph (7) shall be governed by the rules governing the admission of evidence at criminal trials. The Government and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy

of the information to establish the existence of any of the factors set forth in paragraph (6) or (7). The burden of establishing the existence of any of the factors set forth in paragraph (7) is on the Government. The burden of establishing the existence of any of the factors set forth in paragraph (6) is on the defendant.

(4) The jury or, if there is no jury, the court shall return a special verdict setting forth its findings as to the existence or nonexistence of each of the factors set forth in paragraph (6) and as to the existence or nonexistence of each of the factors set forth in paragraph (7).

(5) If the jury or, if there is no jury, the court finds by a preponderance of the information that one or more of the factors set forth in paragraph (7) exists and that none of the factors set forth in paragraph (6) exists, the court shall sentence the defendant to death. If the jury or, if there is no jury, the court finds that none of the aggravating factors set forth in paragraph (7) exists, or finds that one or more of the mitigating factors set forth in paragraph (6) exists, the court shall not sentence the defendant to death but shall impose any other sentence provided for the offense for which the defendant was convicted.

(6) The court shall not impose the sentence of death on the defendant if the jury or, if there is no jury, the court finds by a special verdict as provided in paragraph (4) that at the time of the offense—

(A) he was under the age of eighteen;

(B) his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was

significantly impaired, but not so impaired as to constitute a defense to prosecution;

(C) he was under unusual and substantial duress, although not such duress as to constitute a defense to prosecution;

(D) he was a principal (as defined in section 2(a) of Title 18) in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution; or

(E) he could not reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or would create a grave risk of causing death to another person.

(7) If no factor set forth in paragraph (6) is present, the court shall impose the sentence of death on the defendant if the jury or, if there is no jury, the court finds by a special verdict as provided in paragraph (4) that—

(A) the death of another person resulted from the commission of the offense but after the defendant had seized or exercised control of the aircraft; or

(B) the death of another person resulted from the commission or attempted commission of the offense, and—

(i) the defendant has been convicted of another Federal or State offense (committed either before or at the time of the commission or attempted commission of the offense) for which a

sentence of life imprisonment or death was imposable;

(ii) the defendant has previously been convicted of two or more State or Federal offenses with a penalty of more than one year imprisonment (committed on different occasions before the time of the commission or attempted commission of the offense), involving the infliction of serious bodily injury upon another person;

(iii) in the commission or attempted commission of the offense, the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense or attempted offense; or

(iv) the defendant committed or attempted to commit the offense in an especially heinous, cruel, or depraved manner.

APPENDIX D

The Department of Justice and the President have supported proposals to amend the federal criminal laws to reintroduce a death penalty in certain carefully circumscribed circumstances. Chapter 24 of S. 1, 94th Cong., 1st Sess., would accomplish that goal. Chapter 24 provides in relevant part:

§ 2401. Sentence of Death

(a) In General.—Except as otherwise provided in subsection (b), a defendant who has been found guilty of a Class A felony under section 1101 (Treason), 1111 (Sabotage), 1121 (Espionage), or 1601 (Murder), shall be sentenced to death if:

(1) the offense is under section 1101 (Treason), 1111 (Sabotage), or 1121 (Espionage) and:

(A) the defendant has been convicted of another offense involving treason, sabotage, or espionage, committed before the time of the offense, for which a sentence of life imprisonment or death was authorized;

(B) the defendant, in the commission of the offense, knowingly created a grave risk of substantial impairment of the national defense; or

(C) the defendant, in the commission of the offense, knowingly created a grave risk of death to any person; or

(2) the offense is under section 1601 (Murder) and:

(A) the defendant committed the offense during the commission of an offense described in section 1101 (Treason), 1111 (Sabotage), 1121 (Espionage), 1313(a)(1) (Escape), 1621 (Kidnapping), 1631 (Aircraft Hijacking), or 1701 (Arson);

(B) the defendant has been convicted of another federal offense, or a state offense involving the death of a person, committed either before or at the time of the offense, for which a sentence of life imprisonment or death was authorized;

(C) the defendant has previously been convicted of two or more federal or state felonies, committed on different occasions before the time of the offense, involving the infliction of serious bodily injury upon another person;

(D) the defendant, in the commission of the offense, knowingly created a grave risk of death to another person in addition to the victim of the offense;

(E) the defendant committed the offense in an especially heinous, cruel, or depraved manner;

(F) the defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value;

(G) the defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value; or

(H) the defendant committed the offense against:

(i) the President, or a potential successor to the presidency as defined in section 1359(a)(1)(C);

(ii) the chief of state, or head of government, or the political equivalent, of a foreign power;

(iii) a foreign dignitary who is in the United States on official business; or

(iv) a federal public servant who is a United States official, a law enforcement officer, or an employee of an official detention facility; or who is outside the United States for the purpose of performing his official duties; and who is killed while engaged in the performance of his official duties, or because of an official action taken or to be taken or a legal duty performed or to be performed by him, or because of his status as a public servant.

(b) Imposition Precluded.—Notwithstanding the existence of one or more of the factors set forth in subsection (a)(1) or (a)(2), the court shall not sentence the defendant to death if, at the time of the offense:

(1) the defendant was less than eighteen years old;

(2) the defendant's mental capacity was significantly impaired, although not so impaired as to constitute a defense to prosecution;

(3) the defendant was under unusual and substantial duress, although not such duress as would constitute a defense to prosecution;

(4) the defendant was an accomplice, the conduct constituting the offense was principally the conduct of another person, and the defendant's participation was relatively minor;

(5) the defendant could not reasonably have foreseen that his conduct in the course of the murder for which he was convicted would cause, or would create a grave risk of causing, death to any person; or

(6) the defendant:

(A) in addition to committing the murder for which he was convicted, also committed an offense described in section 1621 (Kidnapping) or 1631 (Aircraft Hijacking);

(B) subsequently was assured by the Attorney General personally that the sentence of death would not be authorized for the murder if he released alive all hostages he then held; and

(C) subsequently, in reliance on the assurance by the Attorney General and in accordance with the conditions upon which such assurance was made, released alive all hostages he held at the time of such assurance.

§ 2402. Procedure to Determine Applicability of Sentence of Death

(a) Separate Sentencing Hearing.—The court shall conduct a separate sentencing hearing to determine the existence or nonexistence of the factors set forth in section 2401(a)(1) or (a)(2) and section 2401(b), unless the government stipulates that none of the factors set forth in section 2401(a)(1) or (a)(2) exists or that one or more of the factors set forth in section 2401(b) exists. The hearing shall be conducted:

(1) before the jury that determined the defendant's guilt;

(2) before a jury impanelled for the purpose of the hearing if:

(A) the defendant was convicted upon a plea of guilty;

(B) the defendant was convicted after a trial before the court sitting without a jury;

(C) the jury that determined the defendant's guilt has been discharged by the court for good cause; or

(D) review by a court of appeals of the original sentence to death has resulted in a remand for resentencing under this chapter; or

(3) before the court alone, upon the motion of the defendant and with the approval of the court and of the government.

(b) Evidence and Argument.—At the sentencing hearing the court shall disclose to the defendant or his counsel all material contained

in the presentence report, if one has been prepared, except such material as the court determines is required to be withheld to protect human life or to avoid impairment of the national defense. Any information in the presentence report that is withheld from the defendant and his counsel shall not be considered in determining the existence of the factors set forth in section 2401(a)(1) or (a)(2) or the nonexistence of the factors set forth in section 2401(b). Any information relevant to any of the factors set forth in section 2401(a)(1) or (a)(2) may be presented by either the government or the defendant, if admissible under the rules governing the admission of evidence at criminal trials. Any information relevant to any of the factors set forth in section 2401(b) may be presented by either the government or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials. The government and the defendant shall be given fair opportunity to rebut any information received at the hearing, and to present argument as to the adequacy of the information to establish the existence of any of the factors set forth in section 2401(a)(1) or (a)(2) and section 2401(b).

(c) Proof.—The burden of establishing the existence of any of the factors set forth in section 2401(a)(1) or (a)(2) is on the government, and is not satisfied unless established beyond a reasonable doubt. The burden of establishing the existence of any of the factors set forth in section 2401(b) is on the defendant, and is not satisfied unless established by a pre-

ponderance of the evidence. The factors set forth in section 2401(b) shall be liberally construed.

(d) Special Verdict.—The jury, or if there is no jury, the court, shall return a special verdict setting forth its findings as to the existence or nonexistence of the factors set forth in section 2401(a)(1) or (a)(2) and section 2401(b).

(e) Sentence.—If the jury or, if there is no jury, the court finds:

(1) that one or more of the factors set forth in section 2401(a)(1) or (a)(2) exists, and that none of the factors set forth in section 2401(b) exists, the court shall sentence the defendant to death;

(2) that none of the factors set forth in section 2401(a)(1) or (a)(2) exists, or that one or more of the factors set forth in section 2401(b) exists, the court shall not sentence the defendant to death but shall impose any other sentenced authorized for a Class A felony under the provisions of section 2001.

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